Supreme Court of the United States

OCTOBER TERM 1902,

No. 234.

THE ONONDAGA NATION, TE-HES-HA, an Onondaga Indian, on his own behalf and on behalf of all the HO-DE-NO-SAU-NEE, SAY-HAQUE, HOSHAYQUA, SHO-HEH-DO-NAH, HA-ON-WEN-GO-WEN-GLE and JARVIS FARMER, Onondaga Indians; HO-DO-OH-GO-AH, a Seneca Indian, HA-JA-AH-GWYSH, a Cayuga Indian, and THE UNIVERSITY OF THE STATE OF NEW YORK, Plaintiffs in error.

against

JOHN BOYD THACHER, Defendant in error.

In Error to the Supreme Court of the State of New York.

BRIEF FOR DEFENDANT-IN-ERROR.

STATEMENT OF THE CASE.

This is a writ of error to review a judgment of the Supreme Court of the State of New York entered upon the order and remittitur of the Court of Appeals of said State of New York. (Pages 192 and 193.)

Said order of the Court of Appeals affirmed a judgment of the Appellate Division of the Supreme Court in the Fourth Judicial Department which had affirmed a judgment in favor of defendant entered upon a dismissal of plaintiff's complaint on the merits on a trial at the Onondaga Trial Term. (Fols. 121-126, 466, 468, 502-507, 517-521.)

The action was brought to recover possession of four "wampum belts," purchased by the defendant from the Rev. Dr. Oliver Crane on or about the 24th day of March, 1893. (Complaint, fols. 8-10 ; finding of fact XI, fol. 96; testimony, fols. 347-352.)

Dr. Crane acquired title to the "belts" during the month of July, 1892, by purchase from Gen. Henry B. Carrington, of the United States Regular Army. (Fols. 95, 236-238.)

The latter bought them on the 10th day of February, 1891, from Thomas Webster, a member of the Onondaga tribe of Indians living on the Onondaga Reservation in the State of New York. (Fols. 95, 223-228.)

On the occasion of each purchase and sale above referred to a cash payment was made by the buyer to the seller as a consideration for the transfer, the amount of such payment being determined by an agreement between the respective parties immediately concerned in each particular transaction.

There is no dispute on the part of those prosecuting this action in respect to the validity of either of such sales, except such as arises from the charge made in the complaint that at the time of the sale to General Carrington the "wampum" was not the property of Thomas Webster, but belonged to a confederacy of Iroquois Indians, designated in the title of this action as "Ho-De-No-Sau-Nee."

This confederacy was originally composed of five tribes or nations of Indians known as the Mohawks, Oneidas, Onondagas, Cayugas and Senecas, and is referred to in history as the "League of the Five Nations."

About the year 1713, another tribe, known as the Tuscaroras, was received into the confederacy, and the latter was thereafter designated as the "League of the Six Nations." (Fol. 246:)

It is alleged in the complaint that certain of the wampum belts constituting the subject-matter of this controversy are a part of the historical records and archives of the confederacy, and, for that reason, are inalienable.

On the trial of the action the attention of the court was directed by the plaintiff's attorney to certain Indian traditions by which it was attempted to be proven that the record of historical events among the Iroquois Indians was perpetuated by a mysterious kind of process whereby that which was "talked into" the wampum was afterwards "talked out" again by the belt itself when the record or proof of that event was needed.

It is apparent from inspection that there is nothing in the substance of the wampum to justify the conclusion that the preservation of the "talk" above referred to was based on the principle of the modern graphophone, nor is it claimed that there was any actual preservation of the language used on the occasion of such ceremonials.

These so-called belts consist of strings of wampum beads or shells braided or pleated together in broad bands. There is nothing in the texture of the belts or the arrangement of the beads of which they are composed to indicate that there is embodied in them any word-signs, which, if read

by an interpreter having knowledge of the meaning of the separate signs, could convey to his hearers an intelligent understanding of the records which they are supposed to represent.

It was claimed, however, on behalf of the plaintiffs that the belts "operate upon the principle of "association. For illustration, a belt was delivered "differing in the arrangement of its beads from "all other wampums. It was the duty of the "'wampum-keeper' to remember and to tell upon "occasion what occurred when that belt was de- "livered. It was also the duty of all royaners "then present to remember and to tell upon occa- "sion the same thing. The idea was that as many "human beings as possible should hear what the "belt was delivered for and should tell it to as "many other human beings as possible, so that the "event for which the belt was to be a record "should be always known when there was any "use for its being known."

On behalf of the defendant it was contended that the belts were not made by or under the direction of the confederacy or any of the nations of which it was composed or for the exclusive use of either, although made by individual members of the tribes and possibly for the purpose of commemorating such events in their history as might be deemed by them important. According to the theory of the defendant they were designed simply to represent the conception or idea of the event to be commemorated which the individual who made the belt had in his mind, in the same manner as an artist commits to the canvas a picture or molds in metal or chisels in stone a representation of his conception of an event in history which he may have never actually witnessed.

To support this theory reference was made to the well-known fact that such pictures and other representations in many cases in our own history have continued for so long a period of time to represent the circumstances supposed to be connected with the event which they are designed to portray and have thereby become so familiar to the public that, although generally known to be inaccurate so far as representing a true picture of what actually occurred at the particular time, are, nevertheless, accepted as real photographs of the persons and objects combined to illustrate the event itself. Such, for example, are the well-known pictures of the "Discovery of America," the "Signing of the Declaration of Independence," and paintings of famous battles of the Revolutionary and Civil wars in our own country, as well as numerous similar examples that might be referred to in the history of other nations.

If this contention is correct, then there is no more reason for the conclusion that the wampum belts were at any time necessarily the property of the confederacy than that the pictures, moldings and carvings above mentioned were at any time the property of the nations with whose history they are connected.

It was further contended on the part of the defendant that conceding the correctness of the theory that the wampum belts were historical records, and, admitting that they were in ancient times actually owned by the Ho-de-no-sau-nee, so-called, it does not necessarily follow that they were still so used and owned at the time of the sale to General Carrington. To uphold this contention it was argued that the evidence in the case proves, beyond any reasonable doubt, that at the date of that transaction

there was no such institution or organization known by that or either of the other names by which the Iroquois confederacy was known during the period of its existence.

Attention was called to the historical fact that after the termination of the campaign of General Sullivan, in 1779, the League of the Six Nations ceased to exist as a confederacy, and the several tribes of which it was composed lost their identity, except so far as their individual members are now regarded as the wards of the United States Government. As stated in chapter 1, page 29, of the "League of the Ho-de-no-sau-nee," by Lewis H. Morgan, offered in evidence by the plaintiffs, "The "treaty of peace between Great Britain and the "United States, in 1783, made no provision for "the Iroquois, who were abandoned in adversity "by their ally and left to make such terms as they "could with the successful republic. A few years "afterwards a general peace was established with "the northwestern Indian nations, including the "Iroquois, all of whom had more or less become "involved in the general controversy. *With the "restoration of peace the political transactions of "the League were substantially closed. This was "in effect the termination of their political exist-"ence. The jurisdiction of the United States was "extended over their territories and from that time "forth they became dependent nations.*"

So that, even upon the assumption that the wampum belts originally might have had the significance which is claimed for them by plaintiffs, it was impossible that they should be regarded in the same aspect after the confederacy was disrupted. As stated in the report of General Carrington, which forms a portion of the last Federal census,

"The wampums are simply reminders of preserved "traditions without any details whatever. As "curious relics they are valuable." (Fol. 316.)

It was further contended that whatever may have been the functions of the office or position of "wampum-keeper" during the existence of the confederacy, there was no use for its continuance thereafter and the office itself was consequently abrogated, that the numerous wampums formerly in the possession of individual members of the various tribes became scattered and were ultimately preserved from total destruction only by reason of the interest taken by individual collectors of relics and heirloom hunters among the tribes, each of whom for that reason received the appellation of "wampum-keeper." These alleged "wampum-keepers," either from the same spirit which actuates a modern collector of curiosities or with a view and desire of exerting over their fellow-members an influence by reason thereof, devoted their attention to the collection and preservation of the wampum.

In conclusion, it was submitted on behalf of defendant that Thomas Webster was such a collector and the wampums purchased by General Carrington were a part of his collection and his private property at the time of the purchase. They had no possible official relation to the "Five Nations," the "Six Nations" or the "Ho-de-no-sau-nee," so-called. They were relics accidentally preserved by Webster, who acted in the self-constituted capacity of "wampum-keeper" long after the official character of such designation had ceased to have tribal recognition. He was not in any sense an official custodian of the property, but by courtesy he held the title of "keeper of the wampums." They were

the result of his years of collection, exhibited by him with a wise ignorance of their chief history. He claimed, through a solemn silence more than by positive information, to know their significance. They never were the property of the Onondaga tribe as a nation and certainly were not at the time of the sale. At that time all coherent relationship of the various nations as parts of the confederacy had ceased to exist and the constitution of the Onondagas recognized none of the functions once in vogue in connection with the position of "wampum-keeper."

The learned justice who decided the issues in this case at the Trial Term embodied a concise statement of his conclusions, as well as the reasons therefor, in the opinion delivered with his decision, which appears at folios 472-498 of the Appeal Book, and is reported in 29 Misc. Rep., 428. The following is an extract therefrom expressing his views concerning the link in the chain of defendant's title attacked in this litigation: "I am rather led to the "conclusion that at and long before the time men- "tioned, the league, to which these wampums are "said to have belonged, had been dissolved; that "we had come to associate even its name with a "period long gone by; that the natives which com- "posed it had become separated, and, to a large "extent, scattered and dispersed and wards of the "government, and that these wampums are curiosi- "ties and relics of a time and condition and con- "federation which has ceased to exist, and that "Webster had possesion of them as one who had "gathered them as such relics. The evidence "given, with reference to the Onondaga Nation and "with reference to Webster, indicates, to my mind, "that they had ceased to treat or regard them as

"the property of the Onondaga Nation, much less "as that of the Iroquois League, and that there "had been long acquiescence in Webster's posses- "sion of them as an individual owner." (Fols. 496-498.)

But whatever may have been the original object or purpose of the making of wampum belts, or whatever may have been their use, it was then and is now contended that the burden rested upon the plaintiffs to prove by a preponderance of competent evidence, not only that they were not actually owned by Webster, but were at the time of the sale from him to Carrington and also at the time of the trial the property of the plaintiffs and that the plaintiffs had the right to sue for and recover the same in an action of this kind.

The plaintiffs failed in both respects, for the trial court dismissed "the complaint, holding that "the plaintiffs had no right to maintain such an "action and that the defendant had good title to "the belts." (See opinion of Appellate Division, fol. 524.)

"After an extended examination of the record" the learned Appellate Division "concluded that the "judgment appealed from should be affirmed." (Fol. 536.)

The Court of Appeals decided that neither the Onondaga Nation nor the individual Indians named as plaintiffs had legal capacity to bring and maintain the action. That court also held that the evidence supported the finding of fact of the trial judge, which had been affirmed by the Appellate Division, that assuming that there was such an official position as that of "wampum-keeper" at the time when it is claimed the University was elected to that position, the University never was

selected as "wampum-keeper," and that it never purchased any of the wampums described in the complaint. (Page 189.)

Facts.

The following are the facts as found by the learned justice who presided at the trial of this action and subsequently affirmed by the Appellate Division and Court of Appeals:

I. During a period of many years prior to the year 1713, there existed a confederacy of Iroquois Indians, composed of the Onondagas, Oneida, Mohawk, Seneca and Cayuga tribes, designated in their own language as the Ho-de-no-sau-nee, but known and referred to in history as the League of the Five Nations. (Fol. 88.)

II. Thereafter and in or about the year 1713, another tribe known as the Tuscaroras was received into said confederacy and thereafter the league was known and referred to as the League of the Six Nations. (Fol. 89.)

III. During the earliest period of the existence of said confederacy, the Indians of which said league was composed made use of strings of wampum beads or shells braided or pleated together in broad bands and commonly known as wampum belts, as a means of commemorating and preserving the memory of important events, such as the making of treaties, the coming of the white man, etc., and while the League of the Iroquois was in active existence the tribes or members thereof composing it employed this method of preserving the history of the events which they conceived to be of importance. (Fol. 90.)

IV. While such custom was in vogue the care and custody of such wampum belts as were so used was entrusted to the Onondaga Nation, which appointed one of its members as an official sometimes designated as the "wampum-keeper," whose duty it was to preserve the same and upon ceremonial occasions expound them and emphasize their meaning and significance. (Fol. 90.)

V. The wampum belts mentioned and described in the complaint in this action constituted a portion of the wampum belts at one time made and possessed by the league and used for the foregoing purposes. (Fol. 91.)

VI. At a time many years prior to the 10th day of February, 1891, the ancient confederacy above referred to, composed, first of the five and then of the six tribes or nations of Indians above mentioned, was dissolved and thereafter had no active or actual existence. Its respective names had become associated with a period long gone by; the tribes of which it consisted had become separated, and, to a large extent, scattered and dispersed throughout the United States of America and the Dominion of Canada, and those who had remained in this country had become wards of the Government. (Fol. 92.)

VII. On and after the happening of the foregoing events, viz., the dissolution and disruption of the said Iroquois Confederacy, the use of the wampum belts for any of the foregoing purposes for which they were originally prepared became obsolete. The wampum thereupon became nothing more than curiosities and relics of a time, condition and confederation which had ceased to exist,

and the office or position of wampum-keeper, so far as its original significance is concerned, became useless and was abrogated. (Fol. 92.)

VIII. On the 10th day of February, 1891, and for many years prior thereto, one Thomas Webster, an Onondaga Indian, had become the owner and was in possession of several of the wampum belts above referred to, including those enumerated in the complaint herein. Said Webster was not then, and never was, an incumbent of the office or position of wampum-keeper of the Onondaga Nation or of any of the individual tribes composing the Iroquois Confederacy, and there was at that time no such official position known or recognized among the Indians composing any or either of said tribes or confederacy. The individual and personal ownership of said Thomas Webster in said wampum belts was recognized by the said several tribes which formerly constituted said league and by the individual members thereof, and said tribes and Indians had long prior to that time ceased to treat or regard said wampum belts as the property of either the Onondaga Nation or the Iroquois League. (Fols. 93 and 94.)

IX. On or about the 10th day of February, 1891, the said Thomas Webster, then being the individual owner and in possession of said several belts of wampum, in consideration of the payment to him of the sum of seventy-five dollars ($75), bargained, sold and delivered said wampum belts to one Henry B. Carrington. (Fol. 95.)

X. Thereafter, and in or about July, 1892, the said Henry B. Carrington, in consideration of the payment to him of the sum of three hundred and

fifty dollars ($350), bargained, sold and delivered said wampum belts to one Oliver Crane. (Fol. 95.)

XI. Thereafter, and on or about the 24th day of March, 1893, the said Oliver Crane, in consideration of the payment to him of the sum of five hundred dollars ($500), bargained, sold and delivered to said defendant, John Boyd Thacher, the said several belts of wampum described in the complaint, and the same have ever since remained in the possession of said defendant. (Fol. 96.)

XII. Said purchase on the part of the defendant was made in good faith and as a matter of public spirit. (Fol. 96.)

XIII. Prior to the commencement of this action neither the Onondaga Nation, the plaintiff (Te-hes-ha), the University of the State of New York, nor any of the other plaintiffs demanded of the defendant the delivery of either of the aforesaid wampum belts. (Fol. 97.)

XIV. The plaintiff, Te-hes-ha, has died since the commencement of this action, and no personal representative or other person has been substituted in his place. (Fol. 97.)

XV. The University of the State of New York never purchased any or either of the wampum belts mentioned and described in the complaint, and said University of the State of New York never was selected or "raised up" to the position or office of "wampum-keeper," and no official proceedings were ever begun on the part of any of the tribes of Indians which formerly composed said Iroquois Confederacy for the purpose of conferring any such position or office upon said University of the State

of New York, assuming that there is or was at the time of said alleged proceedings any such official position. (Fols. 88-98.)

PROOF.

The only proof offered by the plaintiffs on the principal case to support the allegations of the complaint, in addition to the testimony of one witness, viz., John S. Clark, were certain extracts from two books of "Indian Tradition," one published in 1851, of which Lewis Morgan is the author, and the other "Clark's History of Onondaga County," published in 1849, and certain extracts from a "Special bulletin" contained in "the Eleventh Census of the United States," composed in part of history and in part of tradition, interspersed with the views and conclusions of the author. (Fols. 265-341.)

The testimony of John S. Clark was based entirely on knowledge acquired from reading history, or consisted of statements made to him by persons who at the time of the trial were still alive. This evidence was taken subject to the objection that it was hearsay, which it undoubtedly was, unless some other rule of evidence than that usually followed is to be applied to this case. The principal part of it was, on motion, stricken out. There was, therefore, no substantial evidence before the court on the principal case to support any of the allegations of the complaint.

On the part of the defendant, to support his contention, testimony was produced from the mouths of witnesses, who, from knowledge acquired by study, as well as actual experience obtained from many years' acquaintance and association with the descendants of the Indians who formerly consti-

tuted the confederacy, were thoroughly familiar with the facts. They appeared for cross-examination before the attorney representing the plaintiffs, and afforded ample opportunity for testing the foundation of their knowledge. The defendant did not ask the court to sustain his contention by simply taking judicial notice of alleged facts contained in narratives which are more of the nature of romance than reliable history, and, at least, certain portions of which are as fantastic as any fairy tales ever written.

POINTS.

I.

There is nothing apparent upon the record which brings the case within the appellate jurisdiction of the Supreme Court of the United States.

Section 709 of the Revised Statutes of the United States provides that "a final judgment or decree "in any suit in the highest court of a State in "which a decision in the suit could be had, "where is drawn in question the validity of a stat- "ute of or an authority exercised under the United "States and the decision is against their validity, "or where is drawn in question the validity of a "statute of, or authority exercised under, any "State on the ground of their being repugnant to the "constitution, treaties or laws of the United States "and the decision is in favor of their validity; or "where any title, right, privilege or immunity is

"claimed under the Constitution, or any treaty "or statute of, or commission held or authority "exercised under the United States and the de- "cision is against the title, right, privilege or "immunity specially set up or claimed by either "party under such Constitution, treaty, statute, "commission or authority — may be re-examined "and reversed or affirmed in the Supreme Court "upon a writ of error," etc.

Mr. Justice Story, in Crowell v. Randall (10 Peters, 368, 392), says:

In the interpretation of the 25th section of the Judiciary Act of 1789 (which is the source of section 709 of the Revised Statutes), "it has been "uniformly held that to give this Court appellate "jurisdiction two things should have occurred and "be apparent on the record; first, that some one "of the questions stated in the section did arise in "the Court below; and, second, that a decision was "actually made thereon by the same Court in the "manner required by the section. If both of these "do not appear on the record the appellate juris- "diction fails. It is not sufficient to show that "such a question might have occurred or such a "decision might have been made in the Court be- "low; it must be demonstrable that it did exist "and was made."

All the decisions of this Court prior to that date are then reviewed in the opinion and the Court in conclusion reaffirms the interpretation which, according to their own language, "they had con- "stantly maintained" as follows:

"It is, that to bring the case within the 25th "section of the Judiciary Act it must appear upon "the face of the record, first, that some one of the

"the questions stated in that section did arise in "the State Court; second, that the question was "decided by the State Court, as required in the "same section; third, that it is not necessary that "the question should appear on the record to have "been raised and the decision made in direct and "positive terms, *ipsissimis verbis*, but that it is "sufficient if it appears by clear and necessary "intendment that the question must have been "raised and must have been decided in order to "have induced the judgment; fourth, that it is "not sufficient to show that a question might have "arisen or been applicable to the case unless it is "further shown on the record that it did arise and "was applied by the State Court to the case."

And again in the case of Armstrong v. Treasurer of Athens County (16 Peters, 281, 285), this Court has declared that: "In order to give this Court "jurisdiction under the 25th section of the Act "of 1789, it must appear on the record itself to "be one of the cases enumerated in that section "and nothing out of the record certified to this "Court can be taken into consideration. This "must be shown, first, either by express averment "or necessary intendment in the pleadings in the "case; or, second, by the direction given by the "Court and stated in the exception; or, third, when "the proceeding is, according to the law of Louis-"iana, by the statement of facts and of the de-"cision as usually made in such cases by the "Court; or, fourth, it must be entered on the record "of the proceedings in the Appellate Court in cases "where the record shows that such a point may "have arisen and been decided, that it was in fact "raised and decided; and this entry must appear "to have been made by the order of the Court, or

"by the presiding judge by order of the Court, and "certified by the clerk, as a part of the record in "the State Court; or, fifth, in proceedings in "equity, it may be stated in the body of the final "decree of the State Court from which the appeal "is taken to this Court; or, sixth, it must appear "from the record that the question was necessarily "involved in the decision; and that the State Court "could not have given the judgment or decree, "which they passed without deciding it. We are "not aware of any other mode in which the judg- "ment or decree of a State Court can lawfully be "brought before us; and we have stated them par- "ticularly in order to prevent, in the future, the "difficulties and discrepancies which have so often "arisen on this subject."

While it is affirmatively declared in the writ of error herein that there was "drawn in question "the validity of a statute or treaty of or an author- "ity exercised under the United States and the "decision was against their validity, or the validity "of a statute or an authority exercised under said "— on the ground of their being repugnant to the "constitution, treaties or laws of the United "States and the decision was in favor of their "validity," and while it is further declared in such writ of error that in this suit there "was drawn "in question the construction of a clause of the "constitution or of a treaty or statute of or com- "mission held under the United States and the "decision was against the right, title, privilege or "exemption claimed under such constitution, "treaty, statute or commission" (see page 193 of the Transcript of Record), it is respectfully submitted, as will be readily perceived by reference to the respective decisions rendered herein by the several Courts of the State of New York and the

reasons assigned therefor by the said Courts, respectively, that the validity of a statute or treaty or authority exercised under the United States was not even considered and, therefore, could not have been decided by either of such courts; nor was any clause of the Constitution or commission held under the United States referred to and, consequently, could not have been construed.

"A real and not a fictitious Federal question "is essential to the jurisdiction of this Court over "the judgments of State Courts. The bare aver- "ment of a Federal question is not in all cases "sufficient; there must be at least color of ground "for such averment."

Hamblin v. Western Land Co., 147 U. S., 530.

"Where a case is brought to this court on error "or appeal from a judgment of a State Court, "unless it appear in the record that a Federal "question was raised in the State Court before the "entry of final judgment in the case, this Court "is without jurisdiction." (Summerman v. Nebraska, 116 U. S., 54.) "It has also been frequently "decided that to give this Court jurisdiction of a "writ of error to a State Court, it must appear "affirmatively, not only that a Federal question "was presented for decision by the State Court, "but that its decision was necessary to the deter- "mination of the cause and that it was actually "decided adversely to the party claiming a right "under the Federal laws or Constitution, or that "the judgment as rendered could not have been "given without deciding it." (Eustis v. Bolles, 150 U. S., 361; California Powder Works v. Dam, 150 id., 389-393; Missouri P. R. Co. v. Fitzgerald, 160

id., 556-570.) "Nothing of the kind appears from "this record and the writ of error must, therefore, "be dismissed."

Fowler v. Lamson, 164 U. S., 252.

"To give the Court jurisdiction it must appear "affirmatively on the face of the record not only "that a Federal question was raised and presented "to the highest Court of the State for decision, "but that it was decided or that its decision was "necessary to the judgment or decree rendered in "the case."

Detroit City R. Co. v. Guthard, 114 U. S., 133.

It is not enough to give this court jurisdiction over the judgment of the State Court for the record to show that the Federal question was argued or presented to that Court for decision. It must appear that its decision was necessary to the determination of the cause and that it was actually decided, or that the judgment could not have been given without deciding it.

Mayor v. Miss., 21 Wall., 636.
Boling v. Lersner, 91 U. S., 594.
Brown v. Atwell, 92 U. S., 397.

None of the questions in the writ of error enumerated are suggested by the pleadings and no evidence in support of any such contention appears in the record of the trial of the case.

The return to the writ includes not only the record of the case in the Supreme Court of the State of New York for reviewal by the Court of Appeals of that State and the opinion of the Court last mentioned, together with the remittiur there-

from and the judgment of the Supreme Court based thereon, but, also, an affidavit of the attorney for plaintiffs in error which embodies certain correspondence by letters which appears to have passed between himself and the Regents of the University of the State of New York, one of the parties to the action. (Pages 181-189.)

It appears therefrom that on the 21st day of March, 1901, almost one year after the decision of the Appellate Division of the Supreme Court had been rendered, the following resolution was adopted by the University of the State of New York, at a legal meeting of the Regents, viz.:

"Voted that in the case of the Onondaga Nation "v. John Boyd Thacher, the attorney for the "plaintiff be requested to state to the Court of "Appeals that he was under a misapprehension "in supposing that he had received authority from "the Regents to make the University of the State "of New York a party to the suit." (Pages 170 and 182.)

The letters above mentioned relate to a matter of difference of opinion between the Regents of the University of the State of New York and the attorney for the plaintiffs in error on the subject referred to, but neither do any statements therein contained or in any of the other allegations of the affidavit of which they form a part constitute any portion of the record to be reviewed by this Court.

In that affidavit reference is made to a statute of the State of New York known as chapter 153 of the Laws of 1899, entitled "An act to collect and "preserve from loss or injury any and all wam-"pums which the Onondaga Nation of Indians, or

"its wampum keeper, or any of the Ho-De-No-Sau-"Nee, otherwise known as the Five Nations, or the "Six Nations, or the Iroquois is entitled to pos-"session." The second section of that act is as follows: "The provisions of this act shall not "apply to the subject matter of any litigation now "pending in any Court of this State." (See p. 184.)

The act referred to was introduced in the legislature at the request of plaintiffs' attorney and the second section above quoted was added at the suggestion of defendant.

This action has been pending since October 9, 1897 (see fols. 1a-3a), almost two years prior to the passage of the act above referred to, and consequently none of its provisions apply thereto. (This proposition is fully discussed in Point IX of this brief.)

No other statute, State or Federal, is made a part of the record in this suit; neither has the validity or constitutionality of that or any other statute been challenged by either party, or discussed by any of the Courts, and consequently there can be no serious contention that any question was raised as to the construction of any statute or commission held, or authority exercised, under the United States or its repugnancy to the Constitution of the United States, and, therefore, no decision against the title, right, privilege or immunity claimed under either is specially set up or claimed by either party thereunder.

"In order to give this Court jurisdiction of a "writ of error to review a judgment of the highest "Court of a State on the ground that it was de-"cided against the title, right, privilege or "immunity claimed under the Constitution, or a

"treaty or statute of the United States, such title, "right, privilege or immunity must have been "specially set up or claimed at the proper time and "in the proper way."

Morrison v. Watson, 154 U. S., 111.

But the learned counsel for the plaintiffs in error has also caused to be added to the record certain "excerpts from the briefs for the appel- "lants (plaintiffs in error) filed and used in the "Court of Appeals," certified by the clerk of that Court as "correct. transcripts therefrom." (See p. 209.) These excerpts consist of a statement by the plaintiffs' attorney of the grounds upon which the decisions of both branches of the Supreme Court of New York State were based and by which it affirmatively appears that none of the questions mentioned in the writ of error were decided, or even referred to, by the courts. (See pp. 196-203.)

The excerpts also include a portion of the argument of the attorney for plaintiffs in error in support of his contention that the several judgments above mentioned were erroneous and should be reversed.

Then follows a copy of what purports to be a treaty, designated as "The Washington Treaty," which first appeared in the litigation in the form of a supplemental brief filed with the Court of Appeals after the oral argument. (Pages 204-206.)

This alleged treaty was not introduced in evidence on the trial of the case, nor was it printed in any brief until after the case was submitted to the Court of last resort in the State of New York.

Preceding the copy of the treaty is the following declaration over the hyphenated words "As-Que-

Sent-Wah." (These words are understood to be the Indian appellation of the distinguished counsel who represents the plaintiffs in error), viz.:

"This belt was delivered by General Washington "himself to the chiefs and, at the same time, he "gave Red Jacket a large silver medal which I "have often seen in the hands of General Parker, "Red Jacket's grandson."

But even if this statement were a part of the evidence, the fact that the plaintiffs' attorney had seen a silver medal in the hands of Red Jacket's grandson would not be proof that General Washington had delivered that medal to Red Jacket, much less would it be evidence that General Washington had delivered the belt at the same time, or at any time.

But following the declaration of As-Que-Sent-Wah is the further statement for which no one stands sponsor, viz.: "It was delivered by Gen-"eral Washington himself upon ratification of the "treaty." (See page 204.)

That is simply an assumption without a scintilla of evidence to show the identity of the wampum in question with the belt which it is alleged was delivered by General Washington, even if it be conceded that any wampum was so delivered or used in connection with the ratification of that treaty.

The only testimony given by any witness examined during the trial of the suit in relation to the wampum in question was that of Messrs. Carrington and Sanborn.

The following questions were put to General Carrington by Mr. Paige and the following answers given thereto:

"Q. So that the belt represents the treaty which "General Washington made with the Six Nations? "A. It represents *the Indian idea* of that treaty.

"Q. It was made to commemorate that treaty? "A. Yes, sir. That is what I understand. I under- "stand it so. It struck me that there was a sensi- "ble historical factor that had interest." (Fols. 224-225.)

The following questions were asked of Rev. Mr. Sanborn by Mr. Paige and the following answers given:

"Q. Your belief in regard to the belt secondly "described was that it was made to *commemorate* "the treaty between the Six Nations and General "Washington? A. It was a commemorative belt. "*I never regarded that as an official belt of that* "*occasion.*" (Page 136, fol. 406.)

And, again, upon redirect examination of the witness last named, the following questions were asked and answers given:

"Q. When you say that this belt which I hold "in my hand was made to commemorate the treaty "between Washington and the Indians, you mean "that it was the treaty itself? A. That it was the "treaty itself? (In an inquiring manner.)

"Q. Yes. A. No, sir.

"Q. Do you mean anything more than that an "Indian made that to indicate his idea of a treaty "— a memorial in that way? A. That is the idea "of it I have.

"Q. Anything different from what an artist "would do in representing his idea or conception "of what some historical event might be? A. "Substantially that. It was probably, in those "early days, brought out and exhibited.

"Q. Was that the general impression prevailing "among the Indians in reference to this particular "belt? A. That is where I got my information. "I made some inquiries, as many as I could." (Page 141, fols. 422 and 423.)

If, therefore, the question in controversy here was to determine the origin and purpose of this particular wampum belt, the determination that it had no other relation to the treaty than a fanciful representation thereof according to the idea of the particular, individual Indian who made it, would be about as much as any Court would take the risk of holding. But even if it were the treaty itself and the only wampum belt involved in this suit, this Court would not thereby acquire jurisdiction by its writ of error herein. The question raised by the pleadings in this case and also by the evidence in support of the issues raised by the pleadings is one of title to personal property, not one concerning the construction or validity of a treaty or any authority exercised thereunder.

If the parchment or other written record of the treaty now assumed to be in the custody of the Department of the Secretary of State in Washington was sold by its custodian and the title thereby acquired were made the subject of judicial inquiry, the validity or construction of the treaty itself, or any clause thereof, would not be the question at issue.

By referring to the excerpts from plaintiffs' brief in the Court of Appeals which have been added to this record, as above stated, it will be observed that, according to the plaintiff's own interpretation of the record of the Courts of New York, the only questions raised by the pleadings as well as the only questions decided by the trial

and appellate branches of the Supreme Court of New York were those relating to the ownership of the wampum. (Pages 196 and 197.)

"The action was originally brought by the On-
"ondaga Nation and Te-Hes-Ha, on behalf of all
"the Ho-De-No-Sau-Nee as well as themselves, and
"the defendant's answer alleged first, that he was
"the true and lawful owner of each and every of
"said belts of wampum; secondly, denied that they
"were the property of the Ho-De-No-Sau-Nee, and
"thirdly, alleged that the plaintiffs had no capa-
"city to sue." (Page 196, fols. 59, 72 and 76.)

"The Trial Court dismissed the complaint upon
"the grounds: first, that the action could not be
"maintained without a demand, and second, that
"though the wampums had once been the property
"of the Five Nations, they had come to be the
"individual property of Thomas Webster, an On-
"ondaga Indian, who had sold them to General
"Carrington, who had sold them to Dr. Crane, who
"had sold them to the defendant." (Fols. 473-479, see page 107.)

The Appellate Division affirmed the judgment, holding that "the defendant had good title to the "belts, the reasoning of the court being — there "is proof of Webster's ownership of the belts in the "fact of his possession thereof independent of any "proof of his having been a wampum keeper for "years prior to his transfer thereof in 1891." (Fol. 533, page 197.)

To this might be added the following extract from the opinion of the Appellate Division:

"Where the controversy is between other parties
"who claim to have purchased the belts and paid
"the money therefor, then the question of senti-

"ment is gone *and it is a mere question of title to* "*be determined upon the evidence* and *we* are "unable to see any reason why we should reverse "the trial Court in its finding that Webster had "good title to the belts when he made his transfer "in 1891, or why we should not at least conclude "ourselves that the University of the State of "New York has failed satisfactorily to establish "any better title under the transfer of 1898, than "the defendant holds under his chain of title which "began in the Webster transfer of 1891." (Fols. 535 and 536.)

As was said in the following cases decided by this Court, no jurisdiction is acquired to review by writ of error the decision of a State Court, where the issue is a question of title to property even if that title is derived under a grant from or a treaty entered into by the United States.

"The record does not show that it draws in "question any treaty, statute or authority exer- "cised under the United States, or the validity of "any State statute for repugnancy to the Con- "stitution of the United States, or the construction "of any clause of the Constitution, or of a treaty "or statute or commission held under the United "States. It is a mere question of boundary be- "tween two neighbors, both admitted to have valid "grants from the United States."

Moreland v. Page, 20 How., 522.

"In an action of ejectment between two citizens "of Maryland for a tract of land in Maryland, if "the defendant set up an outstanding title in a "British subject which he contends is protected by "the treaty and therefore the title is out of the "plaintiff; and the highest State Court in Mary-

"land decides against the title thus set up, it is "not a case in which a writ of error can lie to the "Supreme Court of the United States. *It is not "'a case arising under a treaty.'*"

Owings v. Norwood's Lessee, 5 Cranch, 344.

"The treaty by which Louisiana was ceded to "the United States recognizing complete grants "issued anterior to the cession and a decision of "a State Court against the validity of a title set "up under such a grant would be subject to re- "visal by this Court under the 25th section of "the judiciary act. But if the State Court only "applies the local laws of the State to the construc- "tion of the grant, it is not a decision against its "validity and this Court has no jurisdiction."

McDonough v. Millaudon, 3 How., 693.

The treaty referred to as the Washington Treaty simply recognizes the rights of the Oneida, Onondaga, Cayuga and Seneca tribes in the reservations which they had acquired by their respective treaties with the State of New York, and the United States therein agreed never to disturb the four tribes above mentioned and who formerly constituted part of the so-called Six Nations, provided that they and each of them "engaged that they "would not claim any other lands." In consideration thereof the United States made them an annual allowance of money and provisions, to be distributed by an agent of the government.

Thus, even if the construction of the treaty was the foundation of the suit, it could hardly be claimed that the right to sue in the Courts of the

State of New York was thereby conferred on the tribes therein mentioned. The treaty itself does not refer in any way to the property which constitutes the subject matter of this controversy and does not extend or limit any of the rights or remedies of the Indian tribes therein mentioned, or any individual member thereof in any other matter. There is no allusion therein to the Ho-De-No-Sau-Nee, in whose behalf this suit purports to have been commenced. (See Complaint, fols. 1-3.)

The Trial Court in this case held that the individual Indians had the right to sue, but notwithstanding such determination it also held that they had no cause of action in this case.

The Appellate Division also held that they had no cause of action herein without regard to the question of their right to sue.

The Court of Appeals held simply "that neither "the Onondaga Nation, nor the individual Indians "named as plaintiffs had legal capacity to bring "and maintain the action." That holding does not necessarily imply that these parties had no right to maintain any other action, nor that they could not obtain the necessary permission by legislative enactment to sue in the Courts of the State, or from Congress to sue in the Federal Courts, which right certain Indian tribes and individual Indians have already acquired. Courts are provided for the determination of controversies in which Indians and Indian tribes become involved and the protection of their rights when necessary, but whether or not they have the right to sue in the Courts of the State of New York, except in the special cases authorized by the Legislature, has not been specially set up in this action so far as indicated by the record in the case, as a right,

privilege or immunity or claim by either party under the Constitution, or any treaty, statute, commission or other authority of the United States.

Cases are cited by counsel for plaintiffs in error which hold that Indian tribes are by the Constitution of the United States placed for certain purposes within the control of the laws of Congress, and wherever such authority is exercised no State, nor any act of its Legislature can withdraw them from the influence of an act which Congress has the constitutional right to pass concerning them.

It has also been held in such a case that they can not be subjected to the process of the Courts of the State. But there has been no attempt in the case at bar to interfere with the operation of any right conferred by act of Congress or any treaty made in pursuance of such law or the Constitution of the United States.

The Courts of New York State have not assumed any jurisdiction over the plaintiffs in error against their wish, but on the contrary, have decided that they had no right to maintain this action therein. No Federal statute or treaty has been violated, and none has been shown to have any application to the subject of the litigation in the case at bar.

"The United States and Congress may pass such "laws as it sees fit prescribing the rules governing "the intercourse of the Indians with one another "and with citizens of the United States, *and also* "*the courts in which all controversies to which an* "*Indian may be a party shall be submitted.*" (United States v. Rogers, 4 How., 567; United States v. Kagama, 118 U. S., 375; Gon-shay-ee, Petitioner, 130 U. S., 343; Cherokee Nation v. Kansas Railway Company, *supra;* Roff v. Burney, 168 U. S., 218.) "But the existence of the right in

"Congress to regulate the manner in which the "local powers of the Cherokee Nation shall be ex- "ercised *does not render such local powers Federal* "*powers arising from and created by the Consti-* "*tution of the United States.*" * * * "The "question whether a statute of the Cherokee Na- "tion which was not repugnant to the Constitution "of the United States or in conflict with any treaty "or law of the United States had been repealed "by another statute of that nation, and the deter- "mination of what was the existing law of the "Cherokee Nation as to the construction of the "grand jury, were solely matters within the juris- "diction of the courts of that nation, and the de- "cision of such a question in itself necessarily in- "volves no infraction of the Constitution of the "United States. Such has been the decision of "this court with reference to similar contentions "arising upon an indictment and a conviction in "a State Court." (In re Duncan, 139 U. S., 449.) "The ruling in that case is equally applicable to "the contentions in this particular arising from "the record before us." (Jones v. Meehan, 175 U. S., 29.

The lack of capacity of the Indian plaintiffs to maintain this action is discussed at considerable length under Points III, IV and V of the brief. But whether or not they have any such right is not a question for review in this Court. Whatever may have been their character prior to March 3, 1871, on that date Congress by law declared that "No Indian Nation or Tribe * * * should be "recognized as an independent Nation, Tribe or "power with whom the United States may contract "by treaty, etc." This was more than twenty-eight years prior to the commencement of this action. They

never were recognized by the United States as "Nations" except nominally. As was said in the case of United States v. Kagama (118 U. S., 375, 385): "They were, and always have been, re- "garded as having a semi-independent position "when they preserved their tribal relations; not "as States, not as Nations, not as possessed of the "full attributes of sovereignty, but as a separate "people, with the power of regulating their inter- "nal and social relations, and thus far not brought "under the laws of the Union or of the State "within whose limits they resided.

"Perhaps the best statement of their position is "found in the two opinions of this Court by Chief "Justice Marshall in the case of the *Cherokee Nation* v. *Georgia* (5 Pet., 1 [30 U. S., bk. 8, L. ed., 25]), and in the case of *Worcester* v. *Georgia* (6 Pet., 536 [31 U. S., bk. 8, L. ed.,492.]) "These opin- "ions are exhaustive; and in the separate opinion of "Mr. Justice Baldwin in the former is a very valu- "able *resume* of the treaties and statutes concern- "ing the Indian Tribes previous to and during the "confederation.

"In the first of the above cases it was held that "these Tribes were neither States nor Nations, had "only some of the attributes of sovereignty, *and* "*could not be so far recognized in that capacity* "*as to sustain a suit in the Supreme Court of the* "*United States.* In the second case it was said "that they were not subject to the jurisdiction as- "serted over them by the State of Georgia, which, "because they were within its limits, where they "had been for ages, had attempted to extend her "laws and the jurisdiction of her courts over "them.

"In the opinions in these cases they are spoken "of as 'wards of the Nation,' 'pupils,' as local de- "pendent communities. In this spirit the United "States has conducted its relations to them from "its organization to this time. But, after an expe- "rience of a hundred years of the treaty-making "system of government, Congress has determined "upon a new departure — to govern them by acts "of Congress. This is seen in the Act of March "3, 1871, embodied in section 2079 of the Revised "Statutes:

"'No Indian Nation or Tribe, within the terri- "'tory of the United States, shall be acknowl- "'edged, or recognized as an independent Nation, "'Tribe, or power, with whom the United States "'may contract by treaty; but no obligation of "'any treaty lawfully made and ratified with any "'such Indian Nation or Tribe prior to March 3, "'1871, shall be hereby invalidated or impaired.'"

United States v. Kagama, 118 U. S., 375-385.

But it will be observed by reference to the record that there were other questions determined in this case, which disposed of the issues involved, independent of the legal capacity of the Indian plaintiffs to sue or their right to maintain this particular action even though the latter might be regarded as Federal questions.

It was decided by the Supreme Court of New York that defendant had title to the property described in the complaint, and that there was no satisfactory proof of any ownership by the individual Indian plaintiffs or the Indian tribe named in the complaint. (Fols. 533-536.) These questions and others, including the Statute of Limita-

tions, the failure to make a demand as a condition precedent to the commencement of the action, the lack of authority of the parties named to represent the Indian tribes alleged to be interested were argued and to a considerable extent were embodied in the opinions of the Courts in the reasoning which led to the determination of the case. (See Points II, IV, V, VI, VII, VIII.)

"Where the State Court based its judgment not "on a law raising a Federal question, but on an "independent ground this Court will not take "jurisdiction of the case even though it might "think the position of the State Court an unsound "one."

De Saussure v. Gaillard, 127 U. S., 216.

"Alleged errors of the State Court which involve "questions either than of fact or of State and not "of Federal law, are not reviewable in the United "States Supreme Court on a writ of error."

Quimby v. Boyd, 128 U. S., 488.

"Where the record shows that the State Court "must, in rendering judgment, have passed upon "several questions, only one of which is ground "of jurisdiction in this Court, and it does not ap- "pear that the decision was necessarily on that "question, this Court has no jurisdiction. Neither "the opinion of the State Court nor the argument "of counsel can be resorted to for the purpose of "showing that the question of Federal cognizance "was decided by the State Court."

Gibson v. Chouteau, 8 Wall., 314.

"A decision by a State Court that an Indian na- "tion bringing an action under a State statute is

"subject to the bar of the Statute of Limitations,
"under a provision of the statute that such actions
"may be brought in the same manner and in the
"same time as if brought by citizens of the State in
"relation to private individual matters, is not the
"decision of a federal question subject to review by
"the Supreme Court of the United States.

"Where the decision of the State Court was
"rested, in addition to other grounds, upon a dis-
"tinct and independent ground not involving any
"federal question, and sufficient in itself to main-
"tain the judgment, the writ of error falls within
"the well-settled rule on that subject, and cannot
"be maintained."

Seneca Nation v. Christy, 162 U. S., 284.

The case last cited was an action in ejectment relating to certain of the lands referred to in the so-called "Washington Treaty." The Seneca Nation of Indians was especially authorized by an act of the Legislature to maintain any action or suit in any court of law or equity in the State necessary to protect their rights in said lands. The answer consisted of a general denial; the defendant also pleaded the Statute of Limitations, and that the plaintiff had not the legal right, title, capacity or authority to maintain the action as in the case at bar. The Court of Appeals held that a grant through which defendant derived title was not in contravention of the provisions of the Federal Constitution or of the Indian Intercourse Act of 1802 and vested in the purchaser a good title free from any claim of the Seneca Nation. It held also that the Statute of Limitations was a bar to the action.

Two days prior to the passage of the enabling act under which the suit was brought, Chancellor Wal-

worth had decided that the Indians could not maintain an action at law in the name of their tribes to recover damages sustained by trespasses on their reservations, or for the use of the lands, as they had no corporate name and no provision was made by law for bringing an ejectment suit. (See opinion in case cited.)

The case in which the decision last referred to was rendered is that entitled Strong v. Waterman (11 Paige, 607), and the case cited in the following extract from the opinion of Judge Cullen (now of the Court of Appeals of New York) in the case of The Montauk Tribe of Indians v. Long Island Railroad Company (28 App. Div., 470), discussed in Point III of this brief. Judge Cullen says:

"It is not worth while to enter upon any discus-
"sion of the status of the Indian tribes within this
"State, as we think that on the question now before
"us *we are concluded by authority.* In Strong v.
"Waterman (11 Paige, 607) it was held that while
"the Indians had the undoubted right to the bene-
"ficial use and occupancy of their lands, no pro-
"vision had been made by law for bringing
"ejectment to recover possession of them; that *as a*
"*body or tribe, the Indians have no corporate name*
"*by which they can institute such a suit.* This
"doctrine was again asserted in Seneca Nation v.
"Christie (126 N. Y., 122), where it was held that
"the right of that nation to sue depended solely
"on the enabling statute of 1845 (chap. 150).
"This ruling cannot be considered *obiter*, as a writ
"of error was dismissed by the Supreme Court of
"the United States on the ground that the decision
"of the Court of Appeals on the effect and con-
"struction of the enabling act necessarily deter-
"mined the controversy, and that, therefore, the
"other grounds on which the decision of that court

"proceeded were immaterial. (Seneca Nation v. "Christie, 162 U. S., 283.) The statute of 1845 in "express terms is limited to the Seneca Nation. "*I can find no general statute passed since the de-* "*cision of Strong v. Waterman which enables* "*Indian tribes or nations to sue as such.* Section "11 of the Indian Law (chapter 679 of the Laws of "1892) cannot be construed as effective for the "purpose."

II.

The defendant is now and has been since the 24th day of March, 1893, the absolute owner of the property which constitutes the subject-matter of this action and has been in the possession of it during all that time.

At the time of the purchase by him, and, so far as is disclosed by the testimony, when the defendant first became aware of the existence of the wampum belts, which now constitute the subject-matter of this controversy, he was acting as one of the three commissioners appointed by the President of the United States, and afterwards by the Governor and the Legislature of the State of New York, to represent that State at the Columbian Exposition, to be held in the city of Chicago during the year 1894. (Chap. 236, Laws 1892.)

The late Senator Donald MacNaughton was one of the commissioners appointed by the Governor, pursuant to the statute, to represent one of the judicial districts of the State, and was associated with Mr. Thacher in the preparation and management of the exhibit of the State at that exposition.

Rev. John W. Sanborn, one of the witnesses who testified on the trial of this action, had been appointed director of the Indian exhibit of the State of New York at Chicago and had ascertained that the belts of wampum, now described in the complaint, were owned by Rev. Dr. Oliver Crane, a Presbyterian clergyman; that they had been on exhibition in the Boston Museum, and also in Yale University. Having knowledge of these facts, and, believing that they would be regarded as an attractive feature of the exhibit under his charge, he suggested to Messrs. Thacher and MacNaughton the propriety of purchasing the wampums out of the moneys appropriated by the State and make the same a part of the New York exhibit.

Defendant and Mr. MacNaughton concluded, however, that the moneys so appropriated were intended to be used for defraying the expense of exhibiting such articles as were owned by the State or presented to it for that purpose, but were not applicable to and could not be devoted to the purpose of purchasing articles to be placed on exhibition. They, therefore, declined to accede to the request of Mr. Sanborn. The latter, however, was quite persistent in his efforts to secure the wampum belts for the Indian exhibit and subsequently appealed to the defendant to aid him in that regard. The defendant, after repeated solicitation, finally acceded to Mr. Sanborn's request and agreed to purchase the belts on his own account, at the same time delivering to Mr. Sanborn his check for the sum of five hundred dollars ($500), drawn on defendant's own personal bank account.

The wampums were thereafter placed on exhibition in Chicago, and in a position to be seen by as many people as ever assembled in any one particular locality. (Fols. 20 and 352.)

These are substantially the allegations of the complaint and the admissions of the answer, as well as the testimony of Mr. Sanborn taken on the trial, in regard to the manner and circumstances under which defendant became possessed of this property. (Complaint, fols. 7-10; testimony, fols. 347-350, 301, 394.)

It is conceded that defendant paid as consideration for the purchase almost twice as much as had been paid less than a year prior thereto by Dr. Crane to General Carrington, and almost four times the amount paid by General Carrington to Thomas Webster for the identical articles. He has never hesitated to acknowledge possession of the property. It was placed in Chicago, labeled as his property, where it could be seen by everybody. It is referred to in the report of the commission as being "*Owned by Honorable John Boyd Thacher*, of Albany, N. Y." (Fols. 130-135.)

It is acknowledged by the secretary of the University of the State of New York that Mr. Thacher was not the "agent of the State" in the transaction, but that "it was purely a personal matter." The good faith and honorable character of Mr. Thacher and the several persons concerned in the sale of the property to him and through whom his title was derived, namely, Rev. Mr. Sanborn, Rev. Dr. Crane and Gen. Carrington, are unassailable.

The receipt given by Dr. Crane for the purchase was through an erroneous impression of the person who formulated it, made in such form as to imply that the State of New York had purchased the wampums, yet, when that person, who is none other than Mr. Sanborn, explained the circumstances on the trial, it appeared conclusively that Mr. Thacher edge of the existence of such receipt, Mr. Sanborn

knows, had not at the date of the trial any knowledge of the existence of such receipt. Mr. Sanborn having prepared it without consultation with Mr. Thacher. (Fols. 365 and 421.)

All the evidence in the case, as well as the pleadings, disclose the fact that the purchase, so far as Mr. Thacher is concerned, was an honest one, made in an open manner, without any desire on his part to acquire possession of the wampums, except so far as he was actuated by purely philanthropic and patriotic motives. As stated in the opinion of Justice Hiscock, "there is nothing to impugn his good "faith. On the contrary, he was induced by others, "as a matter of public spirit, to make this pur- "chase with his own funds to help the Indian ex- "hibit at Chicago, there being no public moneys "available for the purpose." (Fol. 477.)

The original purchase by General Carrington was made upon the supposition that the United States Government would take the wampums from him and reimburse him for the expenses which he had incurred. In the receipt which he took from Thomas Webster the name of the purchaser was left blank, for the reason that he expected to receive notification from Washington that the purchase would be recognized as an official purchase. The amount of his disbursements for that purpose was disallowed by the government. It would not refund any portion of the amount paid by him, and he was, therefore, obliged to retain the wampums. (Deposition of General Carrington, fol. 288.) The sale was made to Dr. Crane in the same way at the solicitation of General Carrington, who needed the money to invest in a book which he desired to have published at that time. (Fol. 237.)

Thus the evidence shows that none of the purchasers were solicitous in regard to the purchase, but that in each case, on account of purely philanthropic motives and with a desire for the preservation of these curiosities, the purchasers were induced to make the purchase and invest their own private funds.

The title of the defendant to the property in question was assailed solely on the ground that at the time of its purchase by General Carrington it was in the custody of Thomas Webster in his alleged official capacity as "wampum-keeper."

Whatever may have been the powers conferred or duties imposed upon such an official position while the Iroquois Confederacy existed, there is no evidence in the case to sustain the claim that any such office was recognized after the dissolution of the league, which occurred more than a century ago.

The undisputed evidence disclosed the fact that the use of the wampum belts for the purposes for which they had been originally made, as contended by the plaintiffs, had become obsolete since the date above referred to. Thereafter the wampum had become nothing more than a curiosity and a relic of a time, condition and federation which had ceased to exist, and, as a result, the position of "keeper of "the wampums" had, so far as its original significance was concerned, become useless and was abrogated. (See finding of fact VIII, fol. 92.)

It was also held by the trial court in a separate finding of fact, fully supported by the testimony of witnesses examined on the trial, which finding was thereafter affirmed by the Appellate Division, that "on the 10th day of February, 1891, and for "many years prior thereto, one Thomas Webster, "an Onondaga Indian, had become the owner and

"was in possession of several of the wampum belts "above referred to, including those enumerated in "the complaint herein. That said Webster was not "then, and never was, an incumbent of the office "or position of wampum-keeper of the Onondaga "Nation or of any of the individual tribes compos- "ing the Iroquois Confederacy, and that there was "at that time no such official position known or "recognized among the Indians composing any or "either of said tribes or confederacy. That the "individual and personal ownership of said "Thomas Webster in said wampum belts was recog- "nized by the said several tribes which formerly "constituted said league and by the individual "members thereof, and that said tribes and Indians "had long prior to that time ceased to treat or re- "gard their wampum belts as the property of either "the Onondaga Nation of the Iroquois League." (See finding of fact VIII, fols. 93 and 94.)

A part of the evidence on which the foregoing findings were based includes the testimony of Daniel La Forte, who is the same person designated in the title of the action as one of the plaintiffs by the name Te-hes-ha. (Fol. 197.) His testimony was also corroborated by that of the Rev. John W. Sanborn, who, during the year 1887, was delegated as a missionary among the Indians of the Seneca Nation and served as such for a period of three years thereafter. During that time and subsequent thereto he became conversant with the language of the Indians and translated books for their use. He became an adopted member of the Seneca tribe and had been frequently appointed by them an arbitrator to settle disputes and controversies arising among them. On account of these relations and his familiarity with the customs and habits of the

Iroquois Indians he was appointed director of the United States Indian exhibit at the World's Fair. (Fols. 209, 342-347.)

Another witness sworn in behalf of the defendant was General Carrington, who had spent almost his entire lifetime in the study of the Indians of North America and who was selected by the United States government to make the investigation necessary for the preparation of the article on that subject for the eleventh federal census.

This history of the Six Nations, which appears in the census under the title of "The Indians of the "State of New York," was also also written by him. (See Carrington's deposition, pages 89-114.)

The plaintiff, Te-hes-ha, otherwise known as Daniel La Forte, stated that the Indians "do not "use the wampums any more. *They are only a "relic now. The old customs are fading away, and, "as we do not use the wampums as of old, we do "not have as much interest in them.*" (Fol. 376.) This statement was also repeated to Mr. Sanborn, who said that La Forte told him that they "*were "relics now, sort of heirlooms, like old spinning-"wheels, old almanacs, etc.*" (Fols. 360-364.) And, again, when Mr. Sanborn asked Webster to read them, that is, to explain the belts to him, and asked him of they were authoritative, Webster replied: "*No; our people do not care anything "about them any more; we do not use them.*" (Fol. 363.) This same statement, it appears, was made to Mr. Sanborn by other Indians of the present generation, whose names he enumerated in reply to a question from plaintiff's attorney. (Fol. 364.) When the latter attempted, upon cross-examination, to have Mr. Sanborn admit that the wampums were at one time the property of the Five

Nations, or to state his belief in regard to the same, the witness simply said that he believed they were made to commemorate certain events which occurred in the history of the Five Nations; that the Five Nations did not make them, but some Indians among these Nations either made them or the French helped them to make them. (Fols. 403-406.) And, again, on his redirect-examination, in his explanation of the use of the word "commemorate" in connection with the belt known as the "Washington Belt," he stated positively that the belt was not the treaty itself, and was not "an "official belt of that occasion," but simply a memorial made by some Indian to indicate his idea of the treaty, as the conception that an artist might commit to canvas of a historical event of that character, and that, he stated, was the general impression prevailing among the Indians in reference to this particular belt, as well as others. (Fols. 422-424.)

La Forte made substantially the same statement to General Carrington that he did to Mr. Sanborn, and, as he has stated over his own signature in the case, namely, "no one has any interest in them "now, except himself (meaning Webster), and he "keeps them as relics of old times." (Fol. 219.) In reply to a question of the plaintiffs's attorney, General Carrington (the author of the "Census "Bulletin" referred to so extensively by the attorney for plaintiff in error), stated that the Washington Belt simply represented "*the Indian idea of "the treaty.*" (Fol. 224.) And again in one of the extracts from the bulletin he says: "Notwith-"standing the claims made that the wampum can "be read as a governing code of law, it is evident

"that they are simply reminders of preserved tra-
"ditions without any literal details whatever. As
"curious relics they are valuable."

There is no evidence whatever in the record upon which the judgments of the several courts of the State of New York are founded that either of the wampum belts in controversy is the so-called "Washington treaty" or any other treaty, or that it was delivered to anybody by President Washington.

A supplemental brief was filed by plaintiff with the Court of Appeals after the argument of the case, which consisted of a copy of the document said to be the treaty referred to, and is now made a part of the record on the certificate of the clerk of the Court of Appeals, that it is an "excerpt" from a brief filed in behalf of plaintiff in the Court of Appeals. (Pages 204, 205 and 209.)

Another excerpt introduced in the record in the same manner is an assertion over the signature "As-que-sent-wah" (which is understood to be the Indian cognomen of the distinguished counsel for the plaintiff in this case) that the belt was delivered to the chiefs at the same time he gave Red Jacket a silver medal, which medal As-que-sent-wah saw in the hands of Red Jacket's grandson. (Page 204.) That certainly is no evidence to support the alleged fact that the belt is the treaty or in any way represents it, and the argument based upon the assumption that this string of beads constitutes a duplicate of the treaty, has no foundation in fact.

The testimony of General Carrington fully corroborates that of Messrs. Sanborn and La Forte. He made a special investigation to ascertain the whereabouts of any wampum belts that might be

still in existence and also what knowledge, if any, the Indians had concerning them or how they were regarded by them. He was occupied ten months continuously in this work, and during its progress visited and located every family of the various tribes constituting the confederacy, and made a map of their several reservations showing thereon the location of the house and habitation of each family. He gives an account, in detail, of his various inquiries, made particularly among the old men and women of the various tribes concerning the subject. (Fols. 209-219.)

Several of the Indians told him that a Mr. Bryant, of Buffalo, could give him better information as to old relics than any white man, and that Thomas Webster, of Onondaga, who had spent a good deal of time in collecting old relics, wampums particularly, could, perhaps, aid him. He visited Mr. Bryant and found that he had purchased a wampum for twenty-five dollars from a chief living in Canada, and also, in the course of his investigation, found that it was a customary thing to dispose of wampums, but that they had become so scarce recently that those who had them did not desire to part with them. The wampums in Webster's possession were invariably referred to by the Indians as "Webster's Collection," which he had had in his possession for a good many years. (Fols. 212, 218, 230.)

General Carrington, after visiting the Senecas, Tuscaroras, Cayugas and "St. Regis" or Mohawk Indians, finally arrived at the Onondaga Reservation and spent several weeks at the house of Daniel La Forte, with whom negotiations were conducted for the sale of the wampum described in the complaint. He testified that there was no such official

position as a "wampum-keeper;" that Mr. Webster called himself "wampum-keeper" because he was the only man who had the wampums and kept them, and so cherishing the tradition as wampum keeper; and he (Carrington) *treated him in his report as wampum-keeper,* BUT DID NOT KNOW HIM OFFICIALLY AS SUCH. (Fol. 230.) He also testified that Daniel La Forte treated Webster as tradition treats a person who collects postage stamps and such things, but that, in all his inquiries and investigation made among the Indians having the preservation of these wampums in mind, he did not find one who claimed that anyone but Webster had control of the wampums then in his possession. (Fol. 230.) No one ever disputed his ownership. That Webster had informed him that he had one or two of them for quite a number of years, as long ago as his father's time, and that one or two he had brought from Canada. (Carrington's deposition, fol. 234.)

The general tenor of the entire testimony of both witnesses is to the effect that Webster was simply a "relic-gatherer," and that there were other relic-gatherers of the same kind, but only a few in number among these Indians, both in the United States and Canada, who have been collecting the wampums wherever they could find them, by purchase or otherwise, and have been, to a certain extent, speculating in them. However, with the exception of an Indian like La Forte, who seemed to be somewhat impressed with Webster's pretense that he could discover hidden meanings in the wampum, they had no significance among the members of the tribe generally.

As stated in Clark's History, introduced by the plaintiffs, they, as well as the bag which contained

them, were relics and might be regarded as a great curiosity. Under these circumstances it would be as unjust to insist that they were still the property, if they ever were, of the league, as it would be to insist that the autographs or letters in the handwriting of famous men were the property of the nation with which they were connected, simply because of some official relation which they had to such nation during their lifetime.

III.

None of the plaintiffs other than the University of the State of New York has the legal capacity to sue, or the legal capacity to bring and maintain this action in the courts of this State.

The original parties plaintiff named in the summons and complaint are "the Onondaga Nation "and Te-hes-ha, an Onondaga Indian, on his own "behalf and also on behalf of all of the Ho-de-no-"sau-nee." (Fols. 1a, 3a and fols. 1-2.)

Upon application of the plaintiffs' attorney on the trial of the action the University of the State of New York and the several individuals whose Indian appellations now appear in the title of the action, were made parties plaintiff. (Fols. 79-83.)

It appears, both from the order and the title of the action, as amended, that these additional plaintiffs are members of certain Indian tribes living on reservations maintained by the State of New York.

The right of the so-called Onondaga Nation or any of its individual members, or the members of either of the other Indian tribes referred to in the

amended title to bring or maintain this action, is challenged by the defendant. The issue is raised by the original answer, so far as it affects the original plaintiffs. By the order of the Special Term, as well as the order of the Appellate Division, authorizing the amendment of the answer, the same issue is raised in regard to the additional plaintiffs.

Paragraph 12 of the original answer reads as follows:

"And for a further and separate answer and de-
" fense to the allegations of the complaint herein
" the defendant alleges that neither the Onondaga
" Nation, so called, nor Te-hes-ha, an Onondaga In-
" dian, on his own behalf and also on behalf of the
" Ho-de-no-sau-nee, the alleged parties plaintiff in
" this action, *had or has the legal capacity to sue,*
" *or the legal capacity to bring or maintain this*
" *action.*" (Fols. 76-77.)

The order of the Appellate Division, authorizing the amendment of the answer so as to apply to the additional plaintiffs without further service, provides that the answer be deemed amended by inserting therein an allegation "*that neither of said* " *plaintiffs had or has the legal capacity to sue, or* " *the legal capacity to bring and maintain this* " *action,*" etc. (Fol. 514.)

The right of these alleged plaintiffs to maintain this action is thus made one of the material issues in the case.

Some time prior to the trial of this action it was expressly held in the case of The Montauk Tribe of Indians v. The Long Island Railroad Company (28 App. Div., 470; 51 N. Y. Supp., 142) that "a tribe " of Indians has no corporate name by which it " can institute a suit in ejectment in the courts of " the State of New York."

It was held that such a tribe is not a natural person or corporation, nor an incorporated association permitted by law to maintain an action in the name of any of its officers, or authorized by law to maintain an action as a bribe.

In expressing the unanimous opinion of the court, Mr. Justice Cullen makes use of the following language:

"One of the grounds of the demurrer is that the "plaintiff has no capacity to sue, and this is the "ground on which the decision of the Special "Term proceeded. It is not worth while to enter "upon any discussion of the status of the Indian "tribes within this State, as we think that on the "question now before us *we are concluded by au-* "*thority.* In Strong v. Waterman (11 Paige, "607) it was held that while the Indians had the "undoubted right to the beneficial use and occu- "pancy of their lands, no provision had been made "by law for bringing ejectment to recover posses- "sion of them; that *as a body or tribe, the Indians* "*have no corporate name by which they can insti-* "*tute such a suit.* This doctrine was again as- "serted in Seneca Nation v. Christie (126 N. Y., "122), where it was held that the right of that "nation to sue depended solely on the enabling "statute of 1845. (Chap. 150. This ruling cannot "be considered *obiter*, as a writ of error was dis- "missed by the Supreme Court of the United "States on the ground that the decision of the "Court of Appeals on the effect and construction "of the enabling act necessarily determined the "controversy, and that, therefore, the other "grounds on which the decision of that court pro- "ceeded were immaterial. (Seneca Nation v. "Christie, 162 U. S., 283.) The statute of 1845 in

"express terms is limited to the Seneca Nation. "*I can find no general statute passed since the de-* "*cision of Strong v. Waterman which enables* "*Indian tribes or nations to sue as such.* Section "11 of the Indian Law (chapter 679 of the Laws of "1892) cannot be construed as effective for the "purpose.'"

Mr. Jusice Hiscock, who presided at the trial of this action, following the decision of the court in the case last cited and also the authorities upon which it was based, held that such authorities constituted a direct adjudication of the question, but further commented upon the proposition as follows:

"It is not desirable to review at length all of "the reasons and arguments which have been, or "may be, advanced in favor of or against the right "of a tribe or nation of Indians, as the Onondaga "Nation, to bring suit. The weight of authority in "this State seems to decisively settle the question "in the negative."

"In the first place, the statutes of the State, as "collected and embodied in the Indian Law of 1892 "(chap. 679), both by general provisions and by "those specially relating to the Onondaga Indians, "indicate an intent upon the part of the State to "treat the Indians as wards, and, except when "otherwise specially provided, to trust the protec-"tion of their rights, as tribes or nations, to its "agents, rather than to proceedings by themselves. "Where it was deemed wise to have tribal action "in relation to tribal rights, as in the case of tres-"passes upon tribal lands and in the case of cer-"tain rights in 'oil spring reservations,' express "authority is given for the prosecution of suits in "the name of the 'nation' interested. (Indian

"Laws, secs. 11, 55.) There was, of course, no "necessity for this, if the general power was "possessed by the different tribes or nations of "Indians, as such, to bring suits." (Fols. 484-486; 29 Misc. Rep., 432.

From the foregoing it distinctly appears that the trial court in this case fully considered the effect of the "Indian Law" in arriving at its conclusion, and, presumably, the learned justice who wrote the opinion of the Appellate Division in the case cited was familiar with such provisions of the law as might be regarded applicable and of importance in reaching a determination of the questions involved.

Certainly, all the authorities heretofore cited on the brief of the learned counsel for the plaintiffs in this action are referred to and discussed in the opinion of Mr. Justice Cullen, and, undoubtedly, were given due weight. Consequently there is no force in the suggestion now made that section 5 of the Indian Law "may possibly not have been brought "to the attention of the court." In fact, it appears from the record in this case that at the time of the trial plaintiff's attorney did not seriously dispute this proposition that the Onondaga Nation had no authority to sue and evidently caused the individual Indians to be made parties plaintiff for the very purpose of avoiding the consequence of having no client to maintain the action, as would have been the inevitable result if it were continued in the name of the original parties.

The brief submitted on appeal in the Court of Appeals indicates the doubt which then existed in the mind of the learned counsel on this subject, where he uses the following language: "We had "meant in the existing state of adjudged cases "* * * to go on with whichever plaintiff the

"court finally held entitled to sue and pay the bill "of costs for the others. But after the case had "been argued in the Appellate Division, but before "it was decided, the court decided the case of "Johnson v. Long Island Railroad Company (162 "N. Y., 462.)" (See appellant's brief, page 90.)

The clause last quoted, as well as certain paragraphs of plaintiffs' brief, would seem to indicate that the plaintiffs' counsel had substantially abandoned all contention theretofore made concerning the alleged right of these plaintiffs to sue to recover the possession of the property described in the complaint. It is, however, intimated that "this "bill is properly filed by the individual plaintiffs "to enjoin the defendant from disposing of, de-"stroying, etc. * * * the wampums in question." Or, to use the language of the subsequent paragraph: "The individual plaintiffs can file "this bill to protect the records from destruction, "although they have not capacity to sue for de-"livery of the possession of them."

Assuming such a technical construction to he well founded, inasmuch as the substantial object of the action is the recovery of the possession of the property, the injunction alone would prove to be but the shadow of the remedy sought.

It would seem, however, that the Court of Appeals in the case of Johnson v. Long Island Railroad Company above cited has completely disposed of any such pretence of a claim as is now suggested as a final effort to uphold this action.

The following extract from the language of Mr. Justice Bartlett, who wrote the opinion of the court in the case cited, shows that no foundation exists for any such pretended claim:

"A decision holding that this action could be "maintained, either by the tribe or an individual "member thereof, on behalf of himself and all "others who should come in and contribute, would "be contrary to the policy and practice which have "been long established in our treatment of the "Indian tribes. *They are regarded as the wards of "the State, and, generally speaking, possessed of "only such rights to appear and litigate in courts "of justice as are conferred upon them by statute.*"

As was said by Mr. Justice Williams in the opinion of the Appellate Division in the case at bar, referring to the "Johnson case," "that was an "action to recover real property; this is one to re-"cover personal property — in form, in equity. "But the principle is the same in both actions." (Fol. 525.)

In view of the foregoing, it would seems to be unnecessary to discuss this proposition further, and, if this court upholds the contention of the defendant that neither the Indian tribe nor any of its individual members has the legal capacity to sue, all the plaintiffs, with the exception of the University of the State of New York, are eliminated from the action.

IV.

None of the parties named as plaintiffs ever authorized the commencement or maintenance of this action and not one of said alleged plaintiffs has any real interest in this action, or in the subject-matter thereof.

That the alleged plaintiffs never authorized the commencement of this litigation and are not the

real parties in interest therein is one of the material issues expressly raised by the answer of the defendant.

Paragraph 11 of the answer reads as follows:

"And for a further and separate answer and "defense to the complaint herein the defendant "alleges, upon information and belief, that neither "the Onondaga Nation, so-called, nor Te-hes-ha, so-"called, whose names are inserted as plaintiffs in "the complaint in this action, *have any real inter-"est in this action or the subject-matter thereof, "and that no authority was ever given by either of "said alleged plaintiffs to any persons to com-"mence the action.*" (Fols. 75-76.)

While the foregoing allegation refers specifically to the original plaintiffs, the order of the Appellate Division hereinbefore referred to makes it applicable to the additional plaintiffs brought in at the time of the trial "by adding an allegation that the "plaintiffs now named as parties to this action, "*including the plaintiffs brought in* by said order "of the court, *have no real interest in this action "or the subject-matter thereof, and that no author-"ity was ever given by those plaintiffs to commence "the action.*" (Fol. 513.)

That the University of the State of New York disclaims responsibility for the commencement or maintenance of the action in its name or behalf seems to be conceded by the record in this case. (See page 182.)

On March 14, 1901, the Regents passed a resolution, of which the following is a copy:

"Voted, That in the case of the Onondaga Na-"tion v. John Boyd Thacher, the attorney for the "plaintiff be requested to state to the Court of

"Appeals that he was under a misapprehension "in supposing that he had received authority "from the Regents to make the University of the "State of New York a party to the suit.

"A true record.

"Attest:

"J. R. PARSONS, Jr.,
"Secretary."

The foregoing declaration was evidently intended to be a mild form of expressing the fact that the University of the State of New York had never authorized the use of its name as a party to the action. It certainly cannot be construed otherwise than as a direction to the plaintiffs' attorney to discontinue all further prosecution of the same in its behalf.

Assuming, however, that the other plaintiffs have the right to maintain any action, the issue having been raised by the pleadings that they are not the real parties in interest and had not authorized the commencement of the suit, the burden of proof rested upon them to sustain the allegations of the complaint in respect thereto. They have not only failed to submit any evidence to support such allegations, but, on the contrary, the defendant has, by positive proof, corroborated by the testimony of the original plaintiffs, shown that the real party in interest is a woman named Harriet Maxwell Converse. The defendant has affirmatively shown that Mrs. Converse was never legally authorized to demand the delivery of the belts of wampum and the payment by the defendant of the sum of $500 for the detention thereof, as alleged in the complaint. (Fols. 40 and 49.)

These allegations of the complaint are denied in the following paragraphs of the answer:

Paragraph 8. "The defendant specifically de-"nies * * * that before the beginning of this "action the Onondaga Nation and the plaintiff, "Te-hes-ha, on behalf of all of the Ho-de-na-sau-"nee, as well as himself, or either of said parties, "demanded of the defendant the delivery of said "belts of wampum." (Paragraph 8 of answer, fol. 74.)

Paragraph 9. "The defendant denies, on in-"formation and belief, that at and by a governing "council of the Onondaga Nation, regularly con-"vened, Harriet Maxwell Converse, of New York "city, was, prior to the beginning of this action, "regularly appointed the agent and attorney in "fact of the said nation to recover said wampum." (Paragraph 9 of answer, fol. 75.)

Notwithstanding the fact (as appears by the original title of the action) that a "NATION" is one of the plaintiffs, and is president, acting individually, is the other, the latter did not in either his individual or representative capacity verify or sign the complaint. Neither has any of the plantiffs or any official representative or member of any of the tribes or nations mentioned in the title exercised any such authority.

According to the allegations of the complaint, the right to commence this action and verify the complaint was conferred upon Mrs. Converse abov referred to by a power of attorney, the validity of which is denied by the defendant, as above set forth.

The name Te-hes-ha, which appears in the title of the complaint, is, as has been hereinbefore stated, the Indian appellation of Daniel La Forte, an

Onondaga Indian, who, when this action was commenced, was living on the Onondaga Reservation and president of the Onondaga Nation. (Fols. 184, 188, 192, 197 and 362.)

According to the statement made by the plaintiffs' attorney at the time of the trial the plaintiff, Te-hes-ha, was unable to be present in court on account of illness. (Fol. 198.) It was further stated that he was then dying (fol. 181), and it appears from the record that he has since died. (See finding of fact XIV, fol. 97.)

On the trial there was introduced in evidence a duly authenticated written statement over the signature of Mr. La Forte, dated the 30th day of August, 1897, that is, after the alleged demand for the delivery of the wampums, in which he expressly disavows any intention on his part of bringing any action for the possession of these wampum belts. (Fols. 367-369, 370-383.)

He stated that the defendant came honestly and fairly in possession of the wampums through a source of title the same as that from which Mrs. Converse derived her title to similar belts, which she subsequently sold to the University of the State of New York. He also stated that Mrs. Converse had no legal authority to represent the Onondaga Nation in the matter or to demand the delivery of the wampum belts in its behalf, or in behalf of the Six Nations, or any of the nations of which the leauge was composed, a copy of the alleged demand, dated August 17, 1897, being annexed to the statement.

He also made the following explanation of the reason why the alleged power of attorney to Mrs. Converse could not be regarded as a valid instrument, viz.: That there are twenty-three chiefs of

the Onondaga Nation, of which twelve constitute a quorum; that, at the urgent solicitation of Mrs. Converse, he, as president, summoned the chiefs together, but only five (that is seven less than a quorum) attended; that there being less than a quorum present the meeting was adjourned without transacting any business, and, therefore, did not, and could not have authorized the execution of any legal power of attorney." (Fols. 374-384, and Defendant's Exhibit "A.")

On the trial of the action there was introduced in behalf of the plaintiffs, the Constitution of the Onondaga Nation, adopted on the 9th day of July, 1896, in which it is stated, in paragraph second, that eight of the sachem chiefs shall constitute a quorum for the transaction of national business. (Plaintiffs' Exhibit "D," fol. 449.) There was also introduced on behalf of the plaintiffs the alleged power of attorney, dated July 13, 1897, and purporting to have been signed by seven persons, including one who signs himself as "Marshal of "the Nation." (Fols. 456-458.) Whether, therefore, twelve or eight constitute a quorum for the transaction of business, it appears that less than either number signed the document, and presumably less than either number was present at the meeting, for the reason that all those present signed the paper.

It appears that Mrs. Converse, accompanied by a Mr. Richmond and the plaintiffs' attorney of record in this case, went to the house of Daniel La Forte, on the Onondaga Reservation, without any invitation from anybody connected with the Onondaga Nation, assembled six or seven of these Indians, and obtained their signatures to the alleged power of attorney. (Fol. 445.) The trans-

action, as described by Mr. Richmond in his testimony on the trial, corresponds in all its essential features with the version of Mr. La Forte, in his statement above referred to, and not only shows that there was no legal authorization for the demand of the wampums or the commencement of this litigation, but that the parties above referred to (Mrs. Converse and Mr. Richmond), have been speculating in wampum belts, purchasing them from the same Thomas Webster, who it is claimed in this suit had not the right to dispose of them, and selling them to the University of the State of New York. (Fols. 446-448.)

V.

None of the Indians, made plaintiffs herein after the commencement of this suit, have or ever had any interest in the ownership of the wampums as individuals, and there is no such identity and community of interest between the plaintiff, Te-hes-ha, or the other individual plaintiffs, and the members of the several Indian tribes whose ancestors constituted a part of the League of the Five Nations and the League of the Six Nations, in having such wampum belts preserved and restored to some custodian as permits the maintenance of this action.

This action was commenced October 9, 1897. (Fol. 1a.)

By the order entered December 20, 1898, making certain Onondaga Indians and others additional

plaintiffs it was provided that the complaint be amended without further service by inserting the following allegation:

"That on the 26th day of February, 1898, the "Onondaga Nation elected the University of the "State of New York to the office of 'wampum-"'keeper,' and by bill of sale sold and transferred "to the University of the State of New York all "its interest in the said wampums." (Fols, 2a, 82.)

If the foregoing is a correct statement of fact, then the transaction above mentioned, by virtue of which it is contended authority was conferred upon the University of the State of New York to appear as a plaintiff in this action, at the same time deprived all its co-plaintiffs of any and every possible interest which they might have claimed in the subject-matter of the action.

There is not the slightest suggestion in the evidence introduced on the trial to indicate that any of these individuals ever had any personal interest in the wampum, or any community of interest with any other person or body of persons, which would justify their appearance, as plaintiffs, either individually or in a representative capacity. But, if they ever had any property right therein, the Onondaga Nation assumed by that transaction to dispose of such interest prior to the date when they were made parties to the action.

If the foregoing action on the part of the Onondaga Nation is to be construed so as to have any effect at all, then the individual Indians thereby cease to have any further interest in the matter. If not, then the University of the State of New York never acquired any interest.

VI.

The plaintiff, herein referred to as the University of the State of New York, has no property right or other interest in the subject-matter of this action sufficient to entitle it to bring an action for the recovery of any or either of the wampum belts.

The only right that the University of the State of New York can claim to be made a party plaintiff in this action is that alleged to have been conferred by virtue of certain proceedings which are alleged to have occurred on the 26th day of February, 1898, that is, several months after the commencement of this action, whereby it will be argued that the University was "raised up" to the position of "wampum-keeper of the Onondaga "Nation," and, as such, authorized to "get possession of and safely keep forever all wampums of "the Onondaga Nation and the Five Nations and "the Six Nations." (Fol. 186.)

Immediately after the adoption of the resolution, which constituted the "raising up" ceremonial, another resolution was adopted, ridiculous as it may appear, which authorized the sale to the University of the State of New York of all wampums for five hundred dollars ($500), and such an alleged bill of sale was subsequently executed by the several persons present, in the presence of Mrs. Converse, the real plaintiff in this action, and a Mr. Richmond. (Fols. 189, 192, 196.)

In other words, the University thereby became the official custodian and also the absolute owner of the property at the same time and by virtue of the same transaction.

But before attempting to prove the validity of the pretended election to the office of "wampum-"keeper" it should have been shown conclusively that there was, as a matter of fact, such an official position in existence. This the plaintiffs failed to prove. Whatever may have been the fact prior to the disintegration of the confederacy, as the result of the campaign of General Sullivan, in 1779, there can be no serious contention that during the period subsequent to the date last mentioned there was any tribal recognition of such a title, so far as it might be connected with the performance of any official functions. In fact, there was no confederacy in existence, and there was no use for such an official.

If, however, it is claimed that the position was, as stated in the resolution, "wampum-keeper of the "Onondaga Nation," then there is no possible authority or precedent for the action of the persons interested in that proceeding, unless it is claimed that the office was created at that time.

But the "wampum-keeper" of the Onondaga Nation could not exercise jurisdiction or control over the wampums, which, it is alleged, were the property of the "Ho-de-no-sau-nee," viz., the "League "of the Six Nations."

It is true that an Indian bearing the name of Baptist Thomas, under objection from the defendant, testified in a disconnected way concerning some wampums which he pretended to have seen in the possession of his grandfather, and, in response to a leading question from the plaintiffs' attorney,

stated that his great-grandfather, whose name was Commissary, was elected keeper of the wampums (fols. 430-434); but the pecuniary interest which this individual had in the matter, as indicated by his testimony on cross-examination, was of such a character that any testimony given by him is worthy of very little credence. (Fol. 439.) Mr. Clark, also under objection from the defendant, gave some hearsay testimony in regard to the appellation of "wampum-keeper" given to Harry Webster, the father of Thomas Webster. (Fols. 173-175.) His knowledge was based exclusively upon statements alleged to have been made to him by Daniel La Forte and Alfred Cusick, who, so far as the testimony seems to indicate, were still alive at that time, but were not produced on the trial of the action. The testimony of the witness being hearsay was, therefore, stricken out. (Fol. 173.)

It was also argued, both at the Trial Term and in the Appellate Division, that in the article on the subject of the New York State Indians constituting a part of the last federal census, which was written by General Carrington, that the latter recognized such an official. Conceding that he did, that is not proof of the existence of such an official. But General Carrington merely alluded to the position in the same manner of Messrs. La Forte and Sanborn referred to it. General Carrington explains the allusion in the census article as follows: "The fact "that the people can have no key to their own laws, "and that the *dictum* of the wampum reader is "binding; just as his memory or interpretation of "the emblems shall dictate, seems to weigh little "with the pagan party. Notwithstanding the "claims made that the wampums can be read as a "governing code of law, it is evident that they are

"simply monumental reminders of preserved tra-
"ditions without any literal details whatever. As
"curious relics they are valuable." (Fol. 316.)

General Carrington also testified in his deposition forming part of the testimony taken on the trial of this action, that there was no such official position as "wampum-keeper;" that Webster called himself wampum-keeper because he had wampums, and Carrington so treated him in his report, but did not *know him officially as such.* (Fol. 230.)

The foregoing is the only testimony in the case, relating to the existence of the position of "wam-
"pum-keeper," except the narratives contained in the books of Messrs. Morgan and Clark, from which extracts were read.

It would seem, however, from the statements of the authors of these books that the position of wampum-keeper, as it existed among the Iroquois Confederacy, was an hereditary title. That it was originally conferred upon Ho-ho-we-na-to, who is sometimes referred to as Hiawatha. It further appears, however, that this title was hereditary among the Indians of the Onondaga Nation. (Fol. 149.) "As a safeguard against continual fraud,
"each sachem was raised up and vested with his
"title by council of all the sachems with 'suitable
"'forms and ceremonies.'" (Fol. 136.) The Indian appellation of the alleged "wampum-keeper,
"Thomas Webster," was not "Ho-ho-we-na-to," but "Ha-yah-du-gih-wash." (See picture opposite page 103 and name underneath.)

But while the office has been abrogated, the honorary title has descended, and according to the testimony of Rev. John W. Sanborn, John Buck, an Onondaga Indian, living in Canada, was, in Octo-

ber, 1891, the hereditary wampum-keeper (the honorary title) of the Six Nations, and had in his possession at the unveiling of the monument of Red Jacket, the Seneca Chief, a large number of wampum belts, some of which appear in the picture entitled "Reading the Wampums," offered in evidence in this case. (Fols. 355-360.)

It would seem, therefore, that there was not in existence at the time of the alleged "raising up," during the month of February, 1898, or for years prior to that time, any such recognized official position, except in the sense that it was applied to any Indian who had wampums in his possession, or applied as an honorary title to the descendants of the original wampum-keeper.

But if there were any such position in existence the University of the State of New York was not in the first place eligible to hold it, because it was a position, the incumbent of which should be selected from the Onondaga tribe of Indians, after due ceremonials recognized by the Indians (page 65 of the League of the Iroquois, by Morgan, Ho-no-we-na-to, note: "This sachem was the hereditary keeper of the wampum"). (Fol. 149.)

Secondly, because the University of the State of New York was not and is not qualified to hold any office, public or private; all the authority with which it is vested being conferred by the University Law, being chapter 378, Laws of 1892, and the Constitution, and the right to hold office is not included in such powers.

But if it were conceded that there was such an office and that the University was eligible to election thereto, there is nothing to show that the persons whose signatures are appended to the minutes of the meeting at which the resolution was adopted

were vested with any authority to elect any person or body to such an office. It does not appear that they are recognized sachems of the Onondaga Nation, or that the Onondaga Nation has the sole power of making the selection for the "Six Nations." In the list of titles of sachems which are said to be hereditary in the Onondaga Nation, as they appear in Morgan's League of the Iroquois, it will be observed by comparing the names subscribed to the minutes of the meeting that there are none of the latter which correspond with the former.

O-NUN-DAH-GA-O-NO, or ONONDAGA NATION.

I. 1. To-d-da-ho. 2. To-nes-sa-ah. 3. Da-at-ga-dose.

II. 4. Ga-nea-da-je-wake. 5. Ah-wa-ga-yat. 6. Da-a-yat-gwae.

III. 7. Ho-no-we-na-to.

IV. 8. Ga-wa-na-san-do. 9. Ha-e-ho. 10. Ho-yo-ne-a-ne. 11. Sa-da-qua-seh.

V. 12. Sa-g-ga-ha. 13. Ho-sa-ha-ho. 14. Ska-no-wun-de.

Page 64 of book offered in evidence.

Unless every Indian living on the Onondaga reservation is a sachem or chief, then there is nothing in the evidence to indicate that either of the persons who signed the minutes has any greater authority than any other Indian of the tribe. But if they had such authority, and the meeting at which they assembled was in every respect held in accordance with the Constitution and Rules of the Nation, it is respectfully submitted that any election or selection of an offi-

cer, public or private, which was accomplished by the gift of money or other valuable consideration as an inducement to the persons having the authority to make the selection to vote for any particular candidate, would be contrary to public policy and void. If the position is to be regarded as a public office, then the means whereby the selection was accomplished, as testified to by Baptist Thomas, one of the persons in attendance at the meeting, and who voted on the resolution, would under section 53 and other sections of the Penal Code, embraced under title VI, be sufficient to have invalidated the act and subjected those concerned to a criminal prosecution. Even the Constitution of the Onondaga Nation condemns practices of this character. In the seventh section of that instrument it is stated as follows:

"Any chiefs or sachems who may received money "by Bribery and said the council shall be the duty "amongst the chief to dispose him." (Fol. 453.) And yet it was admitted by Baptist Thomas that there was paid to the chiefs as an inducement for signing the paper, that is adopting the resolution and executing the bill of sale, the sum of five hundred ($500) dollars; that it was paid by a Mr. Richmond, he and Mrs. Converse being present; that two hundred ($200) dollars was used "for the "Nations expenses," and that the balance, three hundred ($300) dollars, was divided among the Indians who were present, viz.: twenty-five ($25) dollars to each. (Fols. 436-441.)

It would seem that any one of these grounds should be sufficient to justify the court in giving little or no weight to any such testimony, so far as it confers any authority upon the University of the State of New York to appear as a plaintiff in this

action. Furthermore, there is nothing in the case to show that the University of the State of New York has any desire to prosecute this action. It does not appear that either Mr. Richmond or Mrs. Converse have any official connection with that institution, nor has any authority been shown by either to represent it, but it affirmatively appears by the letters of Melvil Dewey, which are contained in the answer and introduced in the evidence on the trial, which were written in response to the letters of the defendant, which are set up in the complaint, that on the 18th day of January, 1897, viz., several months before the commencement of the action, and more than a year prior to the alleged election of the University of the State of New York, that he, as the secretary of the latter institution, was satisfied that Mr. Thacher was the owner of the property and simply proposed that he should sell it to the State for what it cost him. (Answer, fols. 63-71; also, testimony, fol. 199.)

But if, notwithstanding the foregoing, the bill of sale and the proceedings preliminary to its execution were in all respects valid, it is respectfully submitted that it does not include, nor could it include in its terms the property described in the complaint in this action. (Fols. 184-197.) It purports to be a conveyance of "all wampum in belts, "strings or otherwise of which it (the Onondaga "Nation) ever had in possession, or was entitled "to the possession of, and all its right, title and "interest to any and all wampums anywhere in "consideration of five hundred dollars." (Fol. 189.) And, "it is hereby made the attorney in fact "of the Onondaga Nation and the individual "sachem chiefs who are here irrevocable, but at its "own cost and expense, to recover possession of the "said wampums by suit or otherwise in the name

"of the Onondaga Nation or *of all or any of the "sachems undersigned, either as such sachem "chiefs or individuals."* (Fol. 193.) It appears that none of the sachem chiefs whose names are subscribed to the instrument are included among the plaintiffs enumerated in the order bringing in the additional plaintiffs or originally named in the title of this action, except Say-ha-que, or Baptist Thomas, and Te-hes-ha, and the latter has since died.

It, therefore, follows that the alleged power of attorney to bring suit in the name of those present and who signed the document has not been complied with and the additional plaintiffs have no authority in the premises.

But the conveyance is made of such wampums as were in the possession of the Onondaga Nation. presumably as the owner. It is alleged that the wampums described in the complaint were the property of the Six Nations (see Complaint, fols. 43 and 44) and, therefore, the wampums described in the bill of sale are not the same.

But if the theory upon which this action is founded is to be sustained, then neither the Onondaga Nation, nor anybody connected with it, had any authority to dispose of these belts, even assuming that they are included in the description contained in the bill of sale. It is alleged that these wampums were deposited with the Onondaga Nation simply in its official capacity as the "keeper of the Central Council Fire." (Complaint, fol. 6.), and it had no greater authority than Webster, assuming that he was the official wampum-keeper (as alleged in the complaint, but of which there was no proof whatever on the trial), to dispose of them. In other words, if the theory on

which this action is founded is to be sustained by this court, then the University of the State of New York acquired no interest in the property described in the complaint and has none on which it can prosecute this suit. If, on the other hand, notwithstanding what has been stated before, there was a valid bill of sale to the University of the State of New York, then the title of the defendant, acquired in the same manner several years before the alleged sale to the University, was perfectly legal and precluded the parties from making any subsequent sale of the same property.

It will be observed that the proceedings taken on the 26th day of February, 1898, were simply for the purpose of ratifying the sale of other wampums by Thomas Webster to Harriet Maxwell Converse, which have since been purchased by the State of New York, through its University or Museum. According to the testimony of Mr. Richmond (fols. 446-448), there were upwards of ten wampum belts purchased from different Indians by Mrs. Converse and are now in the State Library. La Forte says in his statement that some of them at least were purchased from Webster. (Fol. 375.) If Webster had no right to sell the wampums to General Carrington, he certainly had no right to sell wampums to Mrs. Converse. If the theory of the plaintiffs that they are historical records is correct, then no person had the right to sell them. If, however, he had the right to sell to Mrs. Converse, he had the right to sell to General Carrington. The so-called "ratification" was a useless proceeding. The representatives of the nation, which was simply an official custodian, had no authority to permit him to sell the property. It, therefore, conclusively appears that whatever interest the University of the State of New York may have in other wam-

pums, they have none in that described in the complaint, which had been disposed of more than seven years prior to the execution of the bill of sale to it. So that the very evidence, upon which the University of the State of New York claims to be an interested party, proves conclusively the ownership of the wampums in the defendant.

Although in the order amending the complaint so as to allow the University of the State of New York to appear as one of the plaintiffs in the action, it is expressly provided that the allegations of the complaint shall also be amended so as to show the alleged interest that the University had in order to enable it to so appear, viz., its official capacity as "wampum-keeper" and its ownership by virtue of the bill of sale (fol. 82), it has been suggested since the trial of the action that the University of the State of New York is "the trustee of an express "trust" and is suing as such.

In the title of the action the University of the State of New York is named individually without any designation as "trustee," "wampum-keeper," or otherwise.

There is no allegation in the complaint to support any other claim, and in fact, so far as indicated by the record, it was never suggested until after the appeal was taken.

In the case of Myers v. Machado (6 Abb. Pr., 198), cited by the plaintiffs in error, the capacity in which the plaintiff sued was designated both in the title and the amended complaint. This is the usual, if not the only, way the plaintiff can sue in an official or representative capacity.

Paige v. Fazakerly, 36 Barb., 392.

Trustees of Fire Dept. E. D. of Brooklyn v. Acker, 26 How. Pr., 263.

If this plaintiff is allowed to disguise itself in habiliments selected to suit its fancy on each different occasion that it appears in court and assume a character which it deems to suit the occasion, it may be impossible ultimately for the defendant to recognize it and adapt itself to the change.

It is now also asserted "that the wampums properly pertain to the Indian section of the State "Museum." (See chap. 586 of the Laws of 1896.)

The statute cited provides an appropriation of money to be used for the purpose of "collecting or "buying specimens for the Indian collection" in the State Museum.

That the State of New York or any of its departments has any authority to legislate the personal property of any of its citizens into its custody or possession without due process of law and compensation therefor, is a proposition which requires no argument to refute.

It follows, therefore, that this plaintiff has no standing in court and is not entitled to recover either upon the theory advanced on the trial of the action, or any phase or guise in which it has attempted to masquerade since that time.

VII.

The alleged cause of action set forth in the complaint did not accrue within a period of six years prior to its commencement.

The six year statute of limitations is pleaded, and is, therefore, one of the issues. (Fol. 83.)

The answer was amended by adding thereto the following allegation, viz., "that no part of the

"alleged cause of action accrued within six years "prior to the commencement thereof." (Fol. 514.)

In view of the dismissal of the complaint on other grounds, this question was not considered, although referred to in the opinion of the court. (Fol. 498.)

It appears from the testimony in this case that Thomas Webster parted with the possession and ownership of the property on the 10th day of February, 1891, and that the action was not commenced until the 9th day of October, 1897, a period of almost seven years after the time when the cause of action accrued, so far as indicated by the allegations of the complaint.

In order to avoid the effect of the statute, the attorney for the plaintiffs after several months of investigation obtained from General Carrington a letter to the effect that during a portion of the time at least while he and Dr. Crane were in possession of these wampum belts, a period of about two years, they were not within the State of New York. Assuming that to be so, there is no proof in this case that Thomas Webster ever was the wampum-keeper. The claim of the plaintiffs on the trial of this action was that his father, Harry Webster, who died in 1881, was the last wampum-keeper, and that Thomas Webster obtained the belts from him. It appears, however, from the testimony of General Carrington that he obtained some of them in Canada.

If, however, the contention of the plaintiffs in that respect is substantiated, then the cause of action accrued in 1881, when the wampums passed out of the official custody of the alleged wampum-keeper, a period of eighteen years prior to the commencement of this action. This completely estab-

lishes the defense of the statute of limitations interposed by the defendant and is alone sufficient to entitle the defendant to a dismissal of the complaint.

So far as the present plaintiffs are concerned, the action was not commenced until they were made parties to the action, either on the day of the trial, viz., December 22, 1898, or the date of the entry of the order several months thereafter.

When those who now assume to be the plaintiffs were "brought into" the case there were no plaintiffs. The "Onondaga Nation," one of the original plaintiffs, never had the legal capacity to sue, and Te-hes-ha, the other plaintiff, was dead.

It, therefore, appears that this action was not really commenced until about eight years after the transfer to General Carrington, seven years after the transfer to Dr. Crane, and six years after the transfer to the defendant. From whichever standpoint the cause of action is viewed, it accrued, if at all, more than six years prior to the actual commencement of this action.

VIII.

A demand upon the defendant for the delivery of the belts was a necessary prerequisite to the commencement of the action. No demand therefor was ever made upon the defendant by or in behalf of any or either of the plaintiffs herein.

The defendant also respectfully submits that the plaintiffs have failed to prove a legal cause of action, for the reason that there is an entire ab

sence of any evidence to show that there was any legal demand for the possession of the belts made on defendant, on behalf of the original plaintiffs, or any demand whatever made in behalf of the present alleged plaintiffs.

That a demand is a condition precedent to the commencement of an action of this kind is a proposition which it is not necessary to argue.

Hovey v. Bromley, 85 Hun, 540.

In the case of Gillet v. Roberts (57 N. Y., 28), the Court of Appeals has held that, "a *bona fide* "purchaser of personal property, *wrongfully taken* "*from the possession of the owner, is not liable for* "*a conversion until after demand and refusal.*" (See, also, Truesdale v. Bourke, 145 N. Y., 615.) Upon the theory advanced by the plaintiffs that the property which is now the subject of this litigation was wrongfully taken from the possession of the Ho-de-no-sau-nee, the alleged owner, the defendant, who is conceded to have been a *bona fide* purchaser, is not liable for conversion until after demand. (See discussion of this feature of the case in Mr. Justice Hiscock's opinion, fols. 477-480.)

The plaintiffs' attorney has recognized the necessity of making a demand by alleging it as a fact. (Complaint, fol. 45.) The defendant "specifically "denies that before the beginning of this action the "Onondaga Nation and the plaintiff, Te-hes-ha, on "behalf of all the Ho-de-no-sau-nee, as well as him-"self or either of said parties, demanded of the "defendant the delivery of said belts of wampum." (See Answer, paragraph VIII, fol. 74.)

This question, therefore, was made by the pleadings a material issue between the parties on the trial.

The only proof on the subject of demand was that contained in the written statement over the signature of Te-hes-ha, in which he not only shows for reasons which have already been discussed that the Onondaga Nation never authorized any demand to be made, but also repudiates the assumption of any such authority so far as he is concerned.

In fact, the copy of the alleged demand, which is annexed to the deposition of Mr. La Forte (Te-hes-ha), shows that Mrs. Converse did not even assume to demand the belts in behalf of Te-hes-ha. (Fol. 382.) Her demand was made exclusively on behalf of the Onondaga Nation, which did not then have and has not now, according to the decision in the case of the Montauk Tribe of Indians v. The Long Island Railroad Company (28 App. Div., 470), the legal capacity to sue, and consequently has no right to make a legal demand upon which a suit can be instituted.

The present plaintiffs never made any demand or authorized any person to make a demand, legal or otherwise. That is conceded as a matter of fact. Mrs. Converse does not claim that she represents or represented the University or the additional Indians when she made the alleged demand. There is consequently no evidence of any demand from the present plaintiffs, and, therefore, the complaint should be dismissed for the foregoing reason, if for no other.

The plaintiffs have heretofore contended in one point that "There was a sufficient demand," and in another point contended that a demand was unnecessary.

It appears, not only from the evidence taken on the trial of the action, but also from certain references thereto, in the opinion of the trial court, the

defendant then assumed the latter position. Justice Hiscock refers to this branch of the case as follows: "It is, however, urged that a demand upon "defendant for the delivery of the belts was a "necessary prerequisite to the action. *I think that "view was right in this case, and that no sufficient "one was proved.* In fact, my attention is called "to none at all, and the *argument of plaintiff's "counsel is that none was necessary."* (Fol. 476.)

It is now claimed that the "President of the Six Nations," so-called, had the right to make a demand. The weakness of this claim is the fact that there is no proof that the "President" made or attempted to make a demand, but, on the contrary, it appears that he has repudiated the action of Harriet Maxwell Converse in making the demand either for himself or for the Onondaga Nation, a power which she assumed without any legal authority. (Fols. 374-381.)

For the purpose of showing that the University of the State of New York (which was made a party to the action by virtue of the order made December 20, 1898) demanded possession of the wampum, the correspondence between Melvil Dewey, secretary of the Board of Regents, and the defendant, set forth in the complaint and answer has been heretofore referred to.

The first objection to this proof being considered evidence of a demand is that the correspondence occurred in December, 1896, and January, 1897 (fols. 64-71); that is, two years before the University was made a party, and one year before its alleged election to the office of wampum-keeper, which is supposed to have occurred in March, 1898. (Fol. 184.) In other words, a demand is now

claimed to have been made from one to two years before any possible authority for that purpose was conferred, or is alleged to have been conferred upon the party making the demand.

In the second place, it appears from the letter written to Mr. Thacher by Mr. Dewey January 18, 1897, that it was the understanding of Mr. Dewey that the wampums were purchased by Mr Thacher personally, and "not as the agent of the "State." In other words, it is conceded by the secretary of the "University" that they were the defendant's private property, but it was suggested that Mr. Thacher might be willing to give them to the State, or allow the State to purchase them upon paying to him the same price that he had paid for the property.

An admission by this plaintiff, through its chief executive officer, that the property belongs to the defendant, and requesting the latter to present it or sell it to the former, can hardly be considered evidence of a demand, even if made after proof that the plaintiff was authorized to make the demand then. The proof was directly to the contrary.

IX.

Chapter 153 of the Laws of 1899 has no application to the case at bar.

If any reference is made to chapter 153 of the Laws of 1899 by the learned counsel for the plaintiffs in error on this argument, the defendant would respectfully submit the following suggestion in reply thereto for the consideration of the court:

The act above mentioned was introduced at the request of those interested in depriving Mr.

Thacher of the possession of the wampum belts which constitute the subject-matter of this litigation, and in its original form was so framed as to accomplish the object. The bill was subsequently amended in the judiciary committee of the Senate by the addition of section 2, which expressly provides that it shall not apply to the belts involved in this action.

The original draft of the bill consisted of the present sections 1 and 3 and was evidently designed to determine certain of the issues herein involved by legislative action. Section 1 contains certain recitals as to the alleged election of the university as wampum-keeper and its acceptance of the office. The alleged fact first recited is certainly not an undisputed fact, as appears from the evidence in this case. But on the contrary the trial court expressly held that the University of the State of New York was never elected to the position of wampum-keeper. (Finding of Fact XX, fol. 114.) The Appellate Division in commenting on this branch of the case uses the following language, viz.: "It seems to us ridiculous, however, to say "that it could be constituted a wampum-keeper of "any Indian tribe or confederacy. It was not an "Indian, and had no statutory right or power to "be instituted an Indian or wampum-keeper of "the kind indicated by the evidence given in the "case. This claim is not worthy of any serious con-"sideration." (Fol. 527.) The second recital has such a weak foundation that the learned attorney for the plaintiffs did not introduce or even attempt to introduce any evidence on the trial to support it or make any claim in regard thereto. But if applicable to this case, these recitals would not

even, if this law were to be regarded as a public statute, be entitled to be considered other than as *prima facie* evidence.

"That the preambles to public statutes are admissible in suits between private individuals, as "evidence of the facts recited in them, may perhaps be conceded (Rex v. Sutton, 4 M. & S., 532); "although in such cases the evidence, I apprehend, "is *prima facie* only, and not conclusive. But private statutes have never been held admissible "against parties in no way connected with such "statutes. Evidence of this description was rejected by the Court of King's Bench in the case of "Brett v. Beales (1 Mood. & Mal., 416), although "the act in that case expressly provided, that it "'should be deemed and taken to be a *public* act,' "and should be 'judicially taken notice of as such "'by all judges, justices and others, without being "'specially pleaded.' The objections to such evidence are well stated in the case of Elmendorf v. "Carmichael (3 Litt. R., 472.) The court there "say: 'The facts, recited in the preamble of a "'private statute, may be evidence between the "'commonwealth and the applicant or party for "'whose benefit the act passed. But as between "'the applicant and another individual whose "'rights are affected, the facts recited ought not to "'be evidence. * * * Once adopt the principle "'that such facts are conclusive, or even *prima* "'*facie* evidence against private rights, *and many* "'*individual controversies may be prejudiced and* "'*drawn from the functions of the judiciary, into* "'*vortex of legislative usurpation.* * * * "'Such a preamble is evidence that the facts were "'so represented to the legislature, and not that "'they really existed.' All who are familiar with "the general course of legislation will readily con-

"cur in the conclusion arrived at in this case. It "is true, that in the case before us, we have much "greater reason to place confidence in the accuracy "of the facts recited and assumed in the acts read "in evidence, than in the case of most private acts; "for the reason that here was a body of public offi- "cers called the Commissioners of Forfeitures, "whose special duty it was to inquire into and "ascertain the truth of the representation upon "which the Legislature acted. Still the principle "is not changed. The acts are *res inter alios aca*, "and cannot affect those who are in no manner "parties to them."

McKinnon v. Bliss, 21 N. Y., 206, 213.

The plaintiffs have therefore accomplished nothing by the interference of the Legislature except to disclose the fact that they have little confidence in their ability to sustain the position which they have assumed in regard to the election of the university as wampum-keeper, and the effect of the statute of limitations.

It is simply an illustration of the methods to which those who have institgated this suit have resorted in order to deprive the defendant of his property in violation of his constitutional rights.

If the great State of New York is really a party to this action in the guise of one of its departments, this attempt on its part through its legislative body to seize the property of a citizen purchased by him openly and for a valuable consideration, at a time when that citizen is actually engaged in defending his rights to the property in a court of justice established by its Constitution, should be condemned in the most emphatic terms.

It is a matter of public record, as appears from the statute books of the State of New York (chap-

ter 236 of the Laws of 1892) and Senate document No. 86 of 1894, introduced by the plaintiffs in this action (minutes of testimony, page 6), that John Boyd Thacher devoted months of his valuable time to the service of this State without compensation or the expectation of any pecuniary reward. For the honor and glory of that State he has expended large sums of money from his own private funds. He is now a defendant in a lawsuit purporting to have been brought by the University of the State of New York, and not only subjected to the annoyance and expense of defending his property rights, but he is made the subject of a baseless and yet most base insinuation that he became the possessor of this property in a clandestine manner.

The trial court, in its written opinion, has described the true motives which actuated Mr. Thacher in the transaction (fol. 477), and a special finding to the effect that the purchase on his part was made "as a matter of public spirit," is embodied in the formal decision. (Finding XII, fol. 96.)

X.

No reversible error can be assigned in regard to the rulings of the court in excluding evidence or in the findings of fact or conclusions of law.

All the evidence offered, both by plaintiff and defendant, was received on the trial, subject to the objections interposed, which were passed upon by the court after the submission of the whole case for its consideration. (Fol. 150.)

The evidence objected to by the defendant and excluded, to which exception was allowed, consists either of what clearly appears to be hearsay evidence, attempted to be given by the witness, John S. Clark (fols. 172-175); also comments and conclusions of the author contained in a book entitled, "Clark's History of Onondaga County." The author of the book last referred to is not the same person as the witness Clark. That portion of Clark's "history" excluded appears in Italics (fol. 162), and that part which was admitted is printed in Roman letters. The reasons assigned by the trial justice for his rulings as to this evidence are fully set forth in the opinion. (Fols. 489-492.)

The witness, Clark, attempted to repeat statements made to him by Daniel La Forte and Alfred Cusick, concerning the office or position of "wampum-keeper" (fols. 172-175), for the purpose of conveying the impression that there was in existence such an official position, although it appeared that both La Forte and Cusick were alive at the time of the trial and their testimony was not offered. (Fols. 177, 181.) He also, when recalled as a witness, undertook to give a narrative of events, based on information derived from reading history. (Fols. 424-428.) This testimony was clearly inadmissible and incompetent and the objections were properly sustained.

The reading of the matter contained in "Morgan's League of the Iroquois" and "Clark's History of Onondaga County" was objected to on the trial of the action, on the ground that it was incompetent and inadmissible, and not a proper subject or matter for the court to take judicial notice

of, the latter being the ground on which the plaintiffs claim the right to present such matter in evidence. (Fol. 150.)

It is true, as stated by the Court of Appeals, in the case of Howard v. Moot (64 N. Y., 261), that "courts will take notice of whatever ought to be "generally known within the limits of their juris-"diction, and that the history of the Six Nations "of Indians is a part of the history of the State, "of which the court will take notice." In the case cited it became necessary to show the extinction of the Indian title to certain lands in this State. Authentic documentary evidence was produced to prove the fact, and, in addition, the court took judicial notice of the present Indian occupancy, which was limited to the reservation set apart for their use. This was not only a matter of public notoriety, but was a matter of record in the statute books, as stated by the learned court in its opinion.

It does not follow, however, that every statement concerning the traditions, customs and usages of the tribes of which the League was formed, recorded in a local history, and the comments of the author in regard to the same, are entitled to be considered as proof of the facts which such a history purports to describe or relate. The writers referred to cannot, in any respect, be regarded as legal authority, nor can the books from which the extracts are taken be considered of sufficient authority, or the matters to which they relate be held to be of such public importance, weight and knowledge as to enable the court to take judicial notice thereof.

"A local history, *e. g.*, that of Herkimer county, "is not, it seems, admissible in evidence. To war-

"rant its introduction it must relate to such facts "as are of a public and general nature and inter- "est to the whole State."

McKinnon v. Bliss, 21 N. Y., 206, 216.

The same may be said of the History of Onondaga County, above referred to.

Again, in the case of Rowe v. Strong (107 N. Y., 356), it was held, for the same reason, that "Thompson's History of Long Island" was incompetent to prove that possession of land by one person antedated by another person.

Upon the argument in the Court of Appeals counsel for the plaintiffs in error assumed that the Trial Court had in the fifth finding of fact upheld his contention that the wampum, at some time in the distant past, constituted the official records of the Iroquois Confederacy, but upon examination it will be discovered that the court in the fifth finding, by the use of the words "the foregoing purposes," expressly referred to the third finding, which declares that the Indians of which the tribes were composed and not necessarily the league in its official capacity made use of the wampum for the purposes therein mentioned. Any other construction would necessarily be in conflict with all the other findings of fact and the judgments of the several courts based thereon.

But assuming that they were once the property of the league, it appears by the findings of fact numbered VI-IX inclusive, that Thomas Webster, from whom the defendant's source of title is derived, became the absolute owner thereof and he subsequently sold and conveyed them to the defendant in error. (See finding XI.)

But even if this court should "think the position of the State court an unsound one," it will not take

jurisdiction of the case unless a federal question is involved. (See cases cited in Point I of this brief.)

De Saussure v. Gaillard, 127 U. S., 216.
Quimby v. Boyd, 128 id., 488.

XI.

The Writ of Error heretofore granted herein to review the decision of the Courts of the State of New York should be dismissed.

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